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# Social Science and Legal Policy: The Case of Heterosexual Cohabitation

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# Social Science and Legal Policy: The Case of Heterosexual Cohabitation

*Cynthia Grant Bowman\**

INTRODUCTION.....	2
I. WHAT DOES THE SOCIAL SCIENCE LITERATURE TEACH US ABOUT COHABITATION?.....	4
A. Trends in the Literature .....	4
B. How Many Cohabitants Are There and Who Are They?.....	7
C. Duration .....	15
D. Economics .....	20
E. Domestic Violence.....	26
F. Quality: The Partners .....	29
G. Impact on Children .....	31
H. What We Know: A Summary .....	34
II. WHAT ARE THE IMPLICATIONS OF THE SOCIAL SCIENCE FINDINGS? .....	35
A. What We Should Worry About: Exploitation and Vulnerability .....	36
B. What We Should Not Worry About: The Impact on Marriage.....	38
III. RECOMMENDATIONS/GUIDELINES .....	43
A. Imposition by Law of Quasi-marital Status on Partners of Two Years Duration or with a Common Child .....	45
B. A System of Registration for Domestic Partnerships.....	48
C. The Ability of Cohabitants to Contract Out of Obligation.....	49
D. Impact of Proposals on Varying Groups of Cohabitants.....	50

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## INTRODUCTION

The rate at which people live together in unmarried unions has increased enormously in recent decades, making this one of the remarkable social changes of our era. The response to this change in the law review literature has been inadequate. Recent articles about cohabitation have argued simply that the institution of marriage is better than cohabitation for both the couple and their children, and the law should therefore be structured so as to discourage this conduct, because to give legal protections to cohabitants will harm the institution of marriage.<sup>1</sup> Based on an extensive review of the social science literature, I conclude that these arguments are mistaken. Even though marriage may work better overall, this is no argument to deny protection and state benefits to cohabitants. Demographic, social, and economic data show that many cohabitants and their children are vulnerable in ways that could be substantially helped by extending to them the legal protections and government benefits given to married persons. Moreover, extensive data from both the United States and other nations demonstrate no correlation between the availability of legal protections for cohabitants and the prevalence of marriage. Indeed, few people even know, much less are influenced by, their legal rights when making decisions about intimate relationships or childbearing. This article explores the findings of social scientists about cohabitation and argues that the appropriate response is not to deny cohabitants the protection of the law.

Social science literature reveals heterosexual cohabitation to be a complex and changing phenomenon. In the aggregate, however, cohabiting couples are statistically likely to be poor, to come from disadvantaged economic groups within our society, to have children, and to be economically interdependent. Individuals in such families, especially women and children, are likely to be left in a vulnerable economic position if the union is ended by separation or death. Giving them the rights against third parties and government benefits currently limited to married couples may in fact stabilize many of these units, increasing both their duration and the likelihood of a transition to marriage. In short, data comparing cohabiting unions to marriages—showing that they are in the aggregate shorter, less stable, more violent, perhaps less mentally healthy for the partners and typically not as good a setting for children—are in fact strong arguments in favor of extending, rather than denying, legal protections for the parties to these arrangements.

The experience of Western European nations, where heterosexual cohabitation has been an accepted way of life for a longer period than in the United States, suggests that the extension of legal protection to cohabiting couples is unlikely to harm the institution of marriage. The almost universal increase in

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<sup>1</sup> See, e.g., William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005).

heterosexual cohabitation over the last several decades is a result of broad and multi-faceted social forces and has not responded in any significant way to encouragement or neglect by the legal system.

This article is limited to consideration of heterosexual cohabitation. Heterosexuals are different from same-sex couples in an obvious way: their decision not to marry is voluntary. I wholeheartedly support the extension of the protections I advocate in this article to both groups. However, the debate over same-sex marriage has occasioned a flood of illuminating writing about the problems of same-sex couples.<sup>2</sup> This focus has somewhat obscured the continuing problems faced by opposite-sex cohabiting couples. I therefore believe it is both useful and illuminating to engage in a separate analysis of the research into heterosexual unions and possibilities for constructive reform of the laws that apply to them.

This article presents a wide-ranging, though by no means complete, discussion of the social scientific findings about heterosexual cohabitation, presenting what we have been learning from this literature, across time, in an era of rapid social change. I then set forth what I believe to be the implications of these findings, differing in many respects from the conclusions drawn by other legal scholars. In Part I, I discuss trends in the social science literature, statistics and rates of cohabitation, the demographics and duration of cohabiting unions, the economics of cohabiting relationships, including income-splitting, and the effects of cohabitation upon the well-being of the adult partners and their children.

In Part II, I draw my own conclusions about the implications of these findings for legal policy. Even assuming that cohabiting unions are less stable and more conflictual than marriage, less satisfying for most cohabitants, and for these reasons potentially harmful to their children, I conclude that this is not an argument to deny them legal recognition. I argue that we should instead adopt an approach similar to that of many European countries, basing legal policy upon the family structures that exist rather than upon ones we wish existed.

Finally, in Part III, I venture to make a number of recommendations based upon this analysis. Given the differing groups of cohabitants and the distribution of population among them, a one-size-fits-all policy is not appropriate. Multiple approaches need to be available; and the remedies provided, like those in Canada and France, should become available in a manner appropriate to the duration of the relationship and the levels of dependency within it. I propose three types of protection, based on the interests involved: (1) treatment of cohabitants of two years or more, or who have a common child, as though they were married; (2) provision of a system of registration as domestic partners with rights and

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<sup>2</sup> For a very small sampling of this voluminous literature, see WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2002); WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE* (2006); ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002); Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, U. ILL. L. REV. 1, 17-27 (2001).

obligations tantamount to marriage for all cohabitants; and (3) the ability for cohabitants to opt out of undertaking obligations to one another by contract.

## I. WHAT DOES THE SOCIAL SCIENCE LITERATURE TEACH US ABOUT COHABITATION?

### *A. Trends in the Literature*

Heterosexual cohabitation crept into the literature of social science in the 1970s. As one scholar has noted, it was statistically and socially invisible before that time.<sup>3</sup> It was statistically invisible both because it was not very common and because it could not be reliably studied until large-scale surveys and longitudinal studies were undertaken. And it was socially invisible because, as I describe below, the phenomenon was largely confined to lower-income and less-educated people.

Cohabitation began to be constructed as a social issue only when middle-class college students adopted the lifestyle in the late 1960s and early 1970s.<sup>4</sup> The earliest studies were small-scale and non-representative surveys of college students or residents of university towns, published in the early 1970s; high percentages of the respondents proclaimed that they had cohabited or would do so and that they did not disapprove of it.<sup>5</sup> Research based on college students touted cohabitation as either trial marriage or an alternative lifestyle, but was of limited significance, demonstrating the students' embrace of the sexual revolution and counter-cultural lifestyles of the 1960s but saying little about the institution of any new type of family structure.

It was only with the construction and analysis of two major datasets that serious study of cohabitation began. One was a nation-wide longitudinal study of the high school senior class of 1972, with follow-up interviews every several years until 1986; the birth cohorts interviewed would therefore have been born in approximately 1954.<sup>6</sup> Omitting those high school students who did not graduate,

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<sup>3</sup> Kathleen Kiernan, *European Perspectives on Union Formation*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 40, 42 (Linda J. Waite ed., 2000).

<sup>4</sup> In a 1983 book, sociologist Eleanor Macklin described 1966–1975 as the watershed years, during which cohabitation spread into the middle class and gained acceptance. Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation: An Overview*, in *CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES* 49, 52 (Eleanor D. Macklin & Roger H. Rubin eds., 1983).

<sup>5</sup> See, e.g., Ibithaj Arafat & Betty Yorburg, *On Living Together without Marriage*, 9 J. SEX RES. 97 (1973); Judith L. Lyness, Milton E. Lipetz & Keith E. David, *Living Together: An Alternative to Marriage*, 34 J. MARRIAGE & FAM. 305 (1972).

<sup>6</sup> The National Longitudinal Study of the High School Class of 1972 was based on interviews of high school seniors in 1972, who were reinterviewed in 1973, 1974, 1976, 1979, and 1986, at which time there were still 12,841 respondents. See Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 POPULATION & DEV. REV. 703, 707 (1990).

the study undercounted minorities and poor people.<sup>7</sup> The other major empirical study was the National Survey of Families and Households (NSFH), which took place in 1987–88 (thus presumably involving birth cohorts from as late as 1970), with a second wave of interviews in 1992–94.<sup>8</sup> The seminal article by Bumpass and Sweet, describing the NSFH results and documenting the rapid increase in cohabitation since 1970, was published in 1989.<sup>9</sup> Questions about living with an unmarried partner first made their way onto U.S. census forms in 1990, so by now we have two rounds of official statistics as well.<sup>10</sup> After these datasets were available, cohabitation became a frequent topic for study by sociologists and demographers, and made its way onto the agendas of professional meetings.<sup>11</sup> Of the approximately 150 articles I reviewed for this project, three quarters of them were published since 1995, and more than half since the year 2000.

It is important to note that most of the social science literature relied upon by previous commentators in the law reviews and elsewhere are based on these early datasets, even though the increase in cohabitation has led to diffusion of the behavior from lower-income groups and college students to almost every group in the population since then. Bumpass and Sweet's 1989 article is frequently cited, even in articles published in 2003.<sup>12</sup> Yet many of its conclusions have been modified somewhat or re-interpreted in light of what we now know to be an international and apparently irreversible movement that has changed the way the majority of persons form sexual and conjugal unions.<sup>13</sup>

The topics studied by social scientists in this field have varied over the years.<sup>14</sup> Initially, articles noticed, named and measured the phenomenon.<sup>15</sup> After

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<sup>7</sup> See Nancy S. Landale & Katherine Fennelly, *Informal Unions Among Mainland Puerto Ricans: Cohabitation or an Alternative to Legal Marriage?*, 54 J. MARRIAGE & FAM. 269, 271 (1992).

<sup>8</sup> The first wave of data was collected in 1987–88 from 13,008 respondents, of whom 80%, or 10,008, were reinterviewed in 1992–94. This was thought to be the largest representative sample of cohabitants, with 678 in the first wave. See Susan L. Brown, *Union Transitions Among Cohabitors: The Significance of Relationship Assessments and Expectations*, 62 J. MARRIAGE & FAM. 833, 837 (2000).

<sup>9</sup> Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615 (1989).

<sup>10</sup> Prior to 1990, estimates were based on the number of households containing two and only two unrelated adults of the opposite sex. Lynne M. Casper, Philip N. Cohen & Tavia Simmons, *How Does POSSLQ Measure Up? Historical Estimates of Cohabitation 4* (U.S. Bureau of the Census, Population Division, Working Paper No. 36, 1999), available at <http://www.census.gov/population/www/documentation/twps0036/twps0036.html>.

<sup>11</sup> See Macklin, *supra* note 4, at 53.

<sup>12</sup> See Duncan, *supra* note 1, at 1005 n.27.

<sup>13</sup> For example, about 60% of couples now live together prior to marrying. Michael Svarer, *Is Your Love in Vain? Another Look at Premarital Cohabitation and Divorce*, 39 J. HUM. RESOURCES 523, 531 (2004).

<sup>14</sup> See Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1 (2000) (discussing the relevant social science literature of the past few decades).

the NSFH data became available, more sophisticated analysis was possible. Who cohabits?<sup>16</sup> The poor? The educated? Blacks? Whites? Latinos? What can we say about the types of unions they form? How long do they last? Can they be classified? And—of continuing interest—how does cohabitation differ from marriage, and what is likely to be its lasting impact upon that institution?<sup>17</sup> In the late 1990s, economic issues began to be explored, examining, for example, whether cohabitants pooled their income.<sup>18</sup> How did they compare with married couples regarding the division of labor within the household?<sup>19</sup> Most recently, however, the focus has been the impact of cohabitation upon children who grow up in the increasing number of unmarried-partner households.<sup>20</sup>

Research now being published includes cross-national data, combining U.S. and Canadian datasets with large cross-national surveys done by Eurobarometer and by the UN Economic Commission for Europe.<sup>21</sup> Today, therefore, we are in a position to interpret the data that have been produced both in cross-temporal and cross-national perspective, to see both trends and differences—differences among

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<sup>15</sup> See, e.g., Richard R. Clayton & Harwin L. Voss, *Shacking Up: Cohabitation in the 1970s*, 39 J. MARRIAGE & FAM. 273 (1977); Bumpass & Sweet, *supra* note 9.

<sup>16</sup> See, e.g., Landale & Fennelly, *supra* note 7; R.S. Oropesa, *Normative Beliefs about Marriage and Cohabitation: A Comparison of Non-Latino Whites, Mexican Americans, and Puerto Ricans*, 58 J. MARRIAGE & FAM. 49 (1996); R. Kelly Raley, *A Shortage of Marriageable Men? A Note on the Role of Cohabitation in Black-White Differences in Marriage Rates*, 61 AM. SOC. REV. 973 (1996).

<sup>17</sup> See, e.g., Alfred DeMaris & K. Vaninadha Rao, *Premarital Cohabitation and Subsequent Marital Stability in the United States: A Reassessment*, 54 J. MARRIAGE & FAM. 178 (1992); Joshua R. Goldstein & Catherine T. Kenney, *Marriage Delayed or Marriage Forgone? New Cohort Forecasts of First Marriage for U.S. Women*, 66 AM. SOC. REV. 506 (2001); Elizabeth Thomson & Ugo Colella, *Cohabitation and Marital Stability: Quality or Commitment?*, 54 J. MARRIAGE & FAM. 259 (1992).

<sup>18</sup> See, e.g., Julie Brines & Kara Joyner, *The Ties that Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333 (1999); Marin Clarkberg, Ross M. Stolzenberg & Linda J. Waite, *Attitudes, Values, and Entrance into Cohabitation Versus Marital Unions*, 74 SOC. FORCES 609 (1995); Anne E. Winkler, *Economic Decision-making by Cohabitors: Findings Regarding Income Pooling*, 29 APPLIED ECON. 1079 (1997).

<sup>19</sup> Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700 (1999); Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 AM. SOC. REV. 327 (1994).

<sup>20</sup> See, e.g., Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351 (2004); Wendy D. Manning, Pamela J. Smock & Debarun Majumdar, *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RES. & POL'Y REV. 135 (2004); Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 J. FAM. ISSUES 86 (2004).

<sup>21</sup> See, e.g., Patrick Heuveline & Jeffrey M. Timberlake, *The Role of Cohabitation in Family Formation: The United States in Comparative Perspective*, 66 J. MARRIAGE & FAM. 1214 (2004); Kathleen Kiernan, *Redrawing the Boundaries of Marriage*, 66 J. MARRIAGE & FAM. 980 (2004).

nations and among different groups within heterogeneous nations such as the United States.

*B. How Many Cohabitants Are There and Who Are They?*

*1. Statistics*

The amount of cohabitation in the United States has grown at an astonishing rate in the last four decades—from fewer than 500,000 opposite-sex cohabiting couple households in 1960 to 4.9 million (almost ten million individuals) in the most recent census (2000).<sup>22</sup> This is an increase of almost 1000% over forty years, a very rapid social change indeed. Opposite-sex unmarried-partner households now make up at least 9% of all coupled households (coupled households are 57% of all households).<sup>23</sup> The role of age cohort replacement in this change is stark:

[W]e see the dramatic role of cohort replacement as the cohorts on the leading edge of the shift to cohabitation have progressed through the age structure. For example, the proportion of 40–44 year olds who had ever lived in a cohabiting relationship increased by about one half as younger cohorts aged into this category. By 1995, half of the women in their thirties had cohabited . . . .<sup>24</sup>

Although the pace of growth appears to have diminished during the 1990s, cohabitation continues to grow.<sup>25</sup>

Not surprisingly, attitudes toward cohabitation have changed rapidly over this period as well. After gaining wide acceptance among young people in the 1980s and 1990s, the continuing trend has been toward more widespread

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<sup>22</sup> Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 88 (2004); U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1 (2003).

<sup>23</sup> MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS, *supra* note 22, at 3. The census is assumed to undercount cohabitants. First, it counts households rather than couples, so that if two unmarried-partner couples reside in the same household, only one would be counted, or if a son and his unmarried partner resided with his married parents, only a married household would be counted. *Id.* at 2. Second, qualitative research demonstrates that cohabitants do not always understand that “unmarried partner” refers to their living arrangement. Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives From Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 1000 (2005) (drawing on 115 in-depth interviews with young working-class cohabitants).

<sup>24</sup> Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 31–32 (2000) (based on NSFH, as updated by the 1995 cycle of the National Survey of Family Growth).

<sup>25</sup> Smock & Manning, *supra* note 22, at 108.



endorsement of nonmarital cohabitation.<sup>26</sup> While 33% of women and 46.9% of men thought living together was a good idea in 1976–77, by 1997–98, 59.1% of women and 66.9% of men agreed with the idea.<sup>27</sup> Whether these attitudes affect behavior or people's behavior affects their attitudes, almost 60% of couples now live together prior to marriage.<sup>28</sup> Thus, as scholars have commented, far from being deviant behavior, cohabitation is now the normal way to initiate unions.<sup>29</sup>

At the same time, the median age of first marriage rose dramatically from 23 for men and 20 for women in 1966 to 27 for men and 25 for women by 1996.<sup>30</sup> The total rate of marriage declined from about 95% in the 1950s to hover around 90%.<sup>31</sup> This decline is partly explained by the changing age structure of the population, so that fewer persons are of prime marriage age, but the rate still falls when one corrects for that.<sup>32</sup> Nonetheless, approximately 75% of Americans (the percentages are fairly similar for women and men) have married by the time they are 30, 83% by the time they are 35, and 94% by age 50.<sup>33</sup> Some commentators have concluded that cohabitation has substituted for the lost or postponed marriages; and increased rates of cohabitation among divorced persons definitely seem to account for decreases in the rate of remarriage.<sup>34</sup>

Yet these changes may not be as drastic as the recent statistics suggest. The oft-used touchstone of 1966 is not a very good one for purposes of comparison.

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<sup>26</sup> Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1023–25 (2001). See also William G. Axinn & Arland Thornton, *The Transformation in the Meaning of Marriage*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION, *supra* note 3, at 147, 156–57.

<sup>27</sup> Thornton & Young-DeMarco, *supra* note 26, at 1024, tbl. 5. There were cross-generational and gender differences of opinion on the issue, although the direction of change was consistently upward for both generations. While 23% of mothers agreed that living together was acceptable in 1980, 44% of their daughters and 59.4% of their sons agreed; by 1993, 32.6% of mothers, 64.2% of daughters and 71.8% of sons agreed. *Id.*

<sup>28</sup> In 1970, cohabitation preceded 11% of marriages and 56% in the 1990s, an increase of 600% in less than thirty years. Svarer, *supra* note 13, at 531.

<sup>29</sup> See, e.g., Scott M. Stanley, Sarah W. Whitton & Howard J. Markman, *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496, 514 (2004).

<sup>30</sup> R.S. Oropesa & Bridget K. Gorman, *Ethnicity, Immigration, and Beliefs about Marriage as a "Tie That Binds,"* in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION, *supra* note 3, at 188; U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2001 4 (2005) (reporting that the median age was still 27 for men and 25 for women in 2003).

<sup>31</sup> Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 852–53 (2004).

<sup>32</sup> Goldstein & Kenney, *supra* note 17, at 508.

<sup>33</sup> NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES, *supra* note 30, at tbl. 3.

<sup>34</sup> Larry L. Bumpass, James A. Sweet & Andrew Cherlin, *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 924, 926 (1991).

The median age of marriage was unusually low in the 1960s, having fallen from 26 for men and 22 for women in 1900.<sup>35</sup> The 95% marriage rate of the 1950s was also an anomaly; 90% is close to what the rate was at the beginning of the century.<sup>36</sup> The 1950s and early 1960s were a period when the generation that had survived the war rushed to marry and produced the “boom” of babies—and their movement was accompanied by a new cult of domesticity.<sup>37</sup> The 1950s and 1960s in the United States were also an era of prosperity perhaps never to be revisited; historically, during difficult economic times, the rate of marriage has dropped.<sup>38</sup> The change in age of marriage may have seemed drastic to persons coming to adulthood in the 1960s and 1970s and their parents, but it loses its startling quality if viewed in historical perspective.

The rise in median age at first marriage is surely a good thing. It is solidly established that marriage at a young age is linked to a high risk of divorce, and later ages of marriage correlate with higher levels of education.<sup>39</sup> But in our society, where premarital intercourse is widely accepted and effective contraception available, the later age of marriage increases the likelihood of non-marital cohabitation.

Clearly cohabitation as an institution is unlikely to disappear. The numbers of unmarried partner households most likely will continue to grow. Simple cohort replacement will drive this increase in part, as the percentage of cohabitants has been increasing with each age cohort, and will continue to do so.

Inter-generational transmission also plays a role in this increase. Studies have shown that children of parents who have either divorced or cohabited are more likely to cohabit, and rates of both divorce and cohabitation have soared.<sup>40</sup> Thus, children who have experienced the increasing divorce rates of their parents’ generation,<sup>41</sup> or lived in the increasing number of unmarried-partner households, will swell the number of cohabitants.

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<sup>35</sup> Cherlin, *supra* note 31, at 852.

<sup>36</sup> *Id.*

<sup>37</sup> See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 16–18 (1963).

<sup>38</sup> Valerie Kincade Oppenheimer, *The Continuing Importance of Men’s Economic Position in Marriage Formation*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION*, *supra* note 3, at 283, 287.

<sup>39</sup> See, e.g., Teachman, *supra* note 20, at 88.

<sup>40</sup> See, e.g., *id.* at 97; Axinn & Thornton, *supra* note 26, at 161–62; NATIONAL MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2000: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 17 (2000).

<sup>41</sup> Bumpass has described the divorce rate as growing at a virtually constant level since 1860, from 7% in 1860 to 50%-plus by the 1980s. Larry L. Bumpass, *What’s Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 *DEMOGRAPHY* 483, 485 (1990). The Census Bureau reports that the divorce rate increased sharply between 1970 and 1975 but has been stable since the late-1970s. NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES, *supra* note 30, at 4.

In addition, as I discuss in more detail below, postponement of marriage and cohabitation are linked in many groups with economic insecurity.<sup>42</sup> A dramatic economic turn-around might increase the rate of marriage, but there has been a relatively long-term decrease in the number of jobs for young males in the United States, especially for those who are not highly skilled.<sup>43</sup> Therefore, an increase in marriage based on widespread economic security seems unlikely as well.

Finally, the population of the United States is itself changing over time. Over the next fifty years, it is estimated that the Anglo American percentage of the population will drop from 70% to 59% of the total, and that the Latino population will rise to 20%, with the African American population remaining at about 12%.<sup>44</sup> Both the African American and Latino communities have high rates of cohabitation.<sup>45</sup> In short, a continuation in the trend toward higher rates of cohabitation appears to be inevitable. It would be unwise to expect that cohabitation is something we can wish away.

## 2. *Demographics*

As the numbers of cohabitants have skyrocketed, the number of distinct groups from which they come has also increased, as have the types and functions of these unions. Although academic attention was first drawn to cohabitation by college students, when the NSFH data became available it showed that the students were in fact latecomers to the practice.<sup>46</sup> Although cohabitation spread rapidly among students and more widely during the 1970s, the initial rise came both earlier and among other groups:

[A]mong the birth cohorts of the 1930s—who reached their mid-twenties in the late 1950s—cohabitation in young adulthood was restricted to a small minority in the lower educational groups. And it is among these same groups that the rise in cohabitation began in the late 1950s. By the 1960s, when the birth cohorts of the 1940s entered adulthood, the rise was under way among all groups. Then there was an

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<sup>42</sup> See *infra* text accompanying notes 48–52.

<sup>43</sup> Kathryn Edin, *What Do Low-Income Single Mothers Say about Marriage?*, 47 SOC. PROBS. 112, 127 (2000). In fact, “[f]or all but highly educated men, real income has declined since the early 1970s.” Pamela J. Smock & Wendy D. Manning, *Cohabiting Partners’ Economic Circumstances and Marriage*, 34 DEMOGRAPHY 331, 332 (1997). See also Oppenheimer, *supra* note 38, at 298–99 (describing downward pressure on wages of unskilled workers).

<sup>44</sup> Oropesa & Gorman, *supra* note 30, at 188–89.

<sup>45</sup> See *infra* Part I.B.2.

<sup>46</sup> Bumpass, Sweet & Cherlin, *supra* note 34, at 918. Similarly, working class families appear to have modeled what has been styled the “postmodern,” dual-income, divorce-extended family. See JUDITH STACEY, *BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA* 252–53 (1990).

acceleration in the 1970s of the rate of growth of cohabitation among nearly all educational groups.<sup>47</sup>

Those most likely to cohabit were persons who had not completed high school or whose families had received welfare, both indicators associated with low income.<sup>48</sup> The connections among low income, low education, and cohabitation remain of continuing importance, leading some scholars to describe cohabitation as the “poor man’s marriage.”<sup>49</sup> One very graphic indication of this may be the geographic distribution of cohabiting opposite-sex couples reported in the 2000 census: the places with the highest percentage were in the older industrial and now depressed areas of the Northeast—Paterson, New Jersey; Manchester, New Hampshire; and Rochester, New York.<sup>50</sup>

There are a number of reasons why this might be so. Qualitative research reveals that marriage, although much revered in lower-income communities, is seen by many as appropriate only when a couple’s economic situation is secure, a situation that may not happen quickly for some groups, if ever.<sup>51</sup> Interviews with working- and lower-middle-class cohabitants suggest that they believe marriage should not occur until financial stability has been reached, including not only the resources for a large wedding but perhaps also for home ownership.<sup>52</sup>

The economic prospects in some communities are dire. Many Black males, for example, are very loosely connected to the workforce and subject to massive unemployment.<sup>53</sup> In-depth interviews with lower-income women show that they are, not surprisingly, wary of forming permanent connections with men who are not economically productive and who may in fact draw resources away from a woman and her children.<sup>54</sup> As a result, marriage rates among African Americans

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<sup>47</sup> Bumpass, Sweet & Cherlin, *supra* note 34, at 917–18.

<sup>48</sup> Bumpass & Sweet, *supra* note 9, at 624.

<sup>49</sup> Bumpass & Lu, *supra* note 24, at 32, tbl. 2; Marin Clarkberg, *The Price of Partnering: The Role of Economic Well-Being in Young Adults’ First Union Experiences*, 77 SOC. FORCES 945, 947 (1999) (describing cohabitation as appealing to males from disadvantaged groups and quoting Nancy S. Landale & Renata Forste, *Patterns of Entry into Cohabitation and Marriage among Mainland Puerto Rican Women*, 28 DEMOGRAPHY 587 (1991)).

<sup>50</sup> MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS, *supra* note 22, at 7.

<sup>51</sup> See generally Edin, *supra* note 43, at 120; Pamela J. Smock, Wendy D. Manning & Meredith Porter, “Everything’s There Except Money”: *How Money Shapes Decisions to Marry Among Cohabitors*, 67 J. MARRIAGE & FAM. 680 (2005).

<sup>52</sup> Smock, Manning & Porter, *supra* note 51, at 687–90.

<sup>53</sup> The unemployment rate for black males 16 years and older in 2004 was 11.1%, but 33.3% of the black male population 16 years and older were not in the labor force at all. BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, 52 EMP. & EARNINGS 199, tbl. 3 (providing statistics on the employment status of the civilian noninstitutional population by age, sex, and race).

<sup>54</sup> Edin, *supra* note 43, at 117–18.

have fallen much more steeply than among other groups.<sup>55</sup> The Centers for Disease Control (CDC) report that:

Since 1950, the marital patterns of white and black Americans have diverged considerably. About 91 percent of white women born in the 1950s are estimated to marry at some time in their lives, compared with only 75 percent of black women born in the 1950s.<sup>56</sup>

Lower-income women interviewed by sociologist Kathryn Edin, including many inner-city African American women, report that they do not want to bring men into the household whom they cannot evict if necessary—if a man's source of income brings danger to the family, for example, or if a more productive male becomes an option.<sup>57</sup> Fears of domestic violence, child abuse, infidelity, alcohol, drugs, and conflict over gender roles exacerbate this unwillingness.<sup>58</sup> African American women therefore express the need to solidify their own connection to the labor market before being willing to marry, and lower-income white women increasingly agree, especially after their first unions end in divorce or separation.<sup>59</sup> Not surprisingly, cohabitation is more common among African Americans than among non-Hispanic whites, shorter in duration, and less likely to lead to marriage.<sup>60</sup>

Cohabitation can be a rational choice for many of these women, although it is likely to be short-lived. Most cohabitants make some type of in-kind contributions to the household economy, perhaps paying part of the rent; and their income, unlike that of husbands, is disregarded for purposes of calculating government benefits.<sup>61</sup> One study, basing its conclusions on four different datasets, showed a significant rate of cohabitation among women on AFDC, as high as 12% to 26%,

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<sup>55</sup> *Id.* at 114. Whereas only 19% of Black women never married in 1970, 57% never married in 1993. Smock & Manning, *supra* note 43, at 331.

<sup>56</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, NAT'L CENTER FOR HEALTH STATISTICS, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES: DATA FROM THE NATIONAL SURVEY OF FAMILY GROWTH 4 (2002) [hereinafter CDC].

<sup>57</sup> Edin, *supra* note 43, at 119.

<sup>58</sup> *Id.* at 124–28. Ironically, although African American men hold very traditional views about gender roles, they are also the most likely to help out with children and housework. M. Belinda Tucker, *Marital Values and Expectations in Context: Results from a 21-City Survey*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION, *supra* note 3, at 166, 183–84.

<sup>59</sup> Edin, *supra* note 43, at 122.

<sup>60</sup> See, e.g., Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 673 (1996); CDC, *supra* note 56, at 12–13, figs. 3 & 4. See also *infra* Part I.C..

<sup>61</sup> Robert A. Moffitt, Robert Reville & Anne E. Winkler, *Beyond Single Mothers: Cohabitation and Marriage in the AFDC Program*, 35 DEMOGRAPHY 259, 264–65 (1998).

but noted that these unions were more likely to form part of a series of such relationships than to be premarital.<sup>62</sup>

Our understanding of the groups likely to cohabit improved enormously with studies of ethnic sub-groups, such as the survey of Puerto Rican women carried out in the New York area in 1985.<sup>63</sup> Puerto Ricans living on the mainland have a particularly high rate of cohabitation.<sup>64</sup> Although this community is economically disadvantaged, that fact does not explain these high rates of cohabitation. Rather, there is a long history of consensual unions that have been regarded as a form of marriage for centuries; while they are becoming less common in Puerto Rico itself, they are very common among Puerto Ricans in the mainland U.S.<sup>65</sup> These couples act in their childbearing, employment, and division of labor as though they were married and are likely to define themselves as such, though their unions are less stable than marriage.<sup>66</sup> The meaning of cohabitation for this group is different from that given it by college students “shacking up,” young middle-class adults in a trial marriage, or the low-income mothers described above.

Thus, cultural factors may be very important to the rate of cohabitation within a sub-group of the population. Latinos certainly cannot be seen as a single group in this respect. For example, while Puerto Ricans are the group most likely to cohabit, Mexican Americans, despite their economic difficulties, exhibit marriage behavior that is similar to that of non-Hispanic white Americans.<sup>67</sup>

Divorced persons were also revealed by the NSFH study to have led the trend to cohabitation: 60% of those who remarried between 1980 and 1987 cohabited before remarriage, 46% with the person they ultimately married.<sup>68</sup> Understandably, these persons may be wary because of their prior experience with marriage and thus determined either to avoid the institution altogether or to screen their next partner very carefully. For this group, again, cohabitation may have a different meaning and a different function. For some, especially those without children, it may be an attractive long-term alternative to marriage.<sup>69</sup>

Older persons in general now form a distinct group of cohabitants, especially in Sunbelt retirement communities.<sup>70</sup> In 1990, 6% of all cohabitants were over the age of 60, up from almost none in 1960.<sup>71</sup> This trend is predicted to increase as

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<sup>62</sup> *Id.* at 260, 272.

<sup>63</sup> Landale & Fennelly, *supra* note 7, at 272.

<sup>64</sup> *Id.* at 278.

<sup>65</sup> *Id.* at 271.

<sup>66</sup> *Id.* at 278–79.

<sup>67</sup> Oropesa, *supra* note 16, at 50.

<sup>68</sup> Bumpass, Sweet & Cherlin, *supra* note 34, at 918.

<sup>69</sup> Sharon Sassler & James McNally, *Cohabiting Couples' Economic Circumstances and Union Transitions: A Re-examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553, 575 (2003).

<sup>70</sup> Albert Chevan, *As Cheaply as One: Cohabitation in the Older Population*, 58 J. MARRIAGE & FAM. 656, 664 (1996).

<sup>71</sup> *Id.* at 659.

cohorts with more experience of cohabitation enter this age group.<sup>72</sup> Again, cohabitation may have a different meaning for this group, who may take advantage of economies of scale in their living arrangements during retirement while responding to certain disincentives to marry (for example, loss of alimony or social security benefits from a prior spouse).<sup>73</sup> One indication of the size and power of this group is given by the fact that, in 2001, when California began to offer a state-wide system of domestic partner registration in response to the needs of same-sex couples, it included opposite-sex couples over the age of 62; and the support of this group was regarded as central to passage of the domestic partnership act.<sup>74</sup>

Social scientists have subjected cohabitants to a great deal of scrutiny about other characteristics—their attitudes to traditional lifestyles, their religiosity, and their political orientation, for example.<sup>75</sup> Although these characteristics were shown in some early studies to correlate with cohabitation behavior, the effect of these determinants has varied over time. As cohabitation has become more common and accepted by most groups within the population, these correlations have faded. For example, political activism, liberalism and low religiosity once strongly correlated with cohabitation, but the predictive power of these characteristics decreased as cohabitation diffused and has been low for cohorts reaching young adulthood after the mid-1970s.<sup>76</sup> Western European studies also show that the influence of a variety of demographic characteristics has disappeared with respect to recent cohorts of cohabitants.<sup>77</sup>

Indeed, even education appears to be disappearing as a predictor of cohabitation among some groups. Brenda Wilhelm's 1998 article analyzing responses from a representative sample of 2,253 U.S. citizens born between 1943 and 1964 showed that, while having less than a high school education increased the odds of cohabitation for those in the oldest cohort, the effect of education disappeared for the youngest cohort.<sup>78</sup> Another scholar working with the 1972 High School dataset found no association between cohabitation and educational attainment.<sup>79</sup>

In fact, education appears to have a much more nuanced relationship to cohabitation than first assumed. There are some indications that educated and

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<sup>72</sup> *Id.* at 664 (pointing out that, in 1990, 11% of the 40–59-year-old unmarried group were cohabiting).

<sup>73</sup> *Id.* at 660–61.

<sup>74</sup> Megan E. Callan, *The More, The Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 SAN DIEGO L. REV. 427, 453–54 (2003).

<sup>75</sup> See, e.g., Brenda Wilhelm, *Changes in Cohabitation Across Cohorts: The Influence of Political Activism*, 77 SOC. FORCES 289 (1998).

<sup>76</sup> *Id.* at 296, 310.

<sup>77</sup> Dorien Manting, *The Changing Meaning of Cohabitation and Marriage*, 12 EUR. SOC. REV. 53, 63 (1996).

<sup>78</sup> Wilhelm, *supra* note 75, at 297, 308.

<sup>79</sup> Clarkberg, *supra* note 49, at 960.

high-achieving women may *prefer* cohabitation, as a lifestyle that allows them to pursue careers and avoid the traditional gender division of labor associated with marriage.<sup>80</sup> On the other hand, wealthier and more educated groups within our society have the highest rates of eventual marriage, which has implications for the transmission of inequality between generations.<sup>81</sup>

In sum, while there are some patterns about cohabitation behavior, those patterns are made up of multiple designs; and many of them are changing with the passage of time. As a result of this demographic research, we do know that multiple and differing groups are included within the aggregate data on cohabitation in the United States, including but not limited to the following:

1. Young “dating” singles, often sharing quarters for reasons of convenience and economy;<sup>82</sup>
2. Young adults cohabiting prior to marriage, either with no plans to marry or as some sort of trial marriage which may succeed or fail;
3. Working-class couples without the resources for a wedding ceremony or home ownership;
4. Low-income mothers making rational use of cohabitation to support themselves and their children;
5. Puerto Rican couples in consensual unions, often with children of the union;
6. Divorced persons either screening candidates for remarriage or seeking an alternative to marriage; and
7. Older persons cohabiting for convenience and economy or because they have no particular reason to marry.

An individual may belong to almost four in ten of these groups at different points in his or her life. There are cross-cutting categories as well—cohabitants with and without children, for example, and unions of longer and shorter duration.

Finally, I note that these categories contain, although they are not coextensive with, some of the most vulnerable groups in our society—low-income mothers, economically distressed ethnic groups, and the elderly.

### *C. Duration*

The duration of cohabiting unions is a topic that has attracted a great deal of attention, for a variety of reasons. Duration presumably relates to the quality of

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<sup>80</sup> Clarkberg, Stolzenberg & Waite, *supra* note 18, at 624; *see also* Clarkberg, *supra* note 49, at 958.

<sup>81</sup> Goldstein & Kenney, *supra* note 17, at 517 (describing the advantages to children of married parents in higher-income families).

<sup>82</sup> Sharon Sassler, *The Process of Entering into Cohabiting Unions*, 66 J. MARRIAGE & FAM. 491, 491 (2004) (reporting on interviews with a relatively small number of young adults cohabiting in New York City who gave the following reasons for doing so: finances, convenience, and housing needs).



these relationships for the partners, and it clearly relates to the stability of living arrangements for any children in their household. Statistics about union length are also important to comparisons between cohabitation and marriage. For my purposes, moreover, the average length of cohabiting relationships is relevant to designing appropriate legal remedies for cohabitants.

The statistics most frequently used to debate these issues are those that appeared in the 1989 Bumpass and Sweet article, to the effect that two fifths of cohabiting unions last less than one year, only one third make it through two years, and only one in ten is intact after five years.<sup>83</sup> Median duration was reported as 1.3 years (Bumpass refers to 1.5 years in later articles), and cohabitants who subsequently marry were reported to be almost twice as likely to divorce as others who did not cohabit prior to marriage.<sup>84</sup> Social science and law articles have built on these statistics, while drawing their own conclusions. One 1996 article by two social scientists, entering the debate about how cohabitation is similar to or different from marriage, concluded from these statistics that a nontrivial number of cohabiting unions constitute a permanent alternative to marriage:

[F]or one tenth of cohabitators, it is a long-term relationship that seldom ends in marriage . . . . In the majority of cases, cohabitation shares many of the qualities of marriage . . . . [F]or a nontrivial proportion of cohabitators, it is a permanent living arrangement, a replacement for marriage.<sup>85</sup>

Bumpass also declared that cohabitation was a family form that was here to stay and recommended that social policy be directed at ameliorating the negative consequences rather than turning back the tide.<sup>86</sup> Others have reached different conclusions. One early and frequently cited article, based on the 1972 High School data, proclaimed that cohabitation was more like being single than a marriage-like family form.<sup>87</sup> Others—especially those writing in the law review literature—have drawn the simple conclusion that cohabitation is short-lived, unstable, and should not be given legal protection as a result.<sup>88</sup>

The NSFH findings upon which these conclusions all rest define the stability of cohabitation by measuring the relationship from its inception until it ends either in marriage or separation.<sup>89</sup> One may obviously quarrel with using this as the touchstone of stability. Can one say that a cohabitation that ended in marriage

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<sup>83</sup> Bumpass & Sweet, *supra* note 9, at 620.

<sup>84</sup> *Id.*; see also Bumpass, *supra* note 41, at 487 (describing median as 1.5 years). Another article describes the average duration as about 1.75 years. Allan V. Horwitz & Helen Raskin White, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 J. MARRIAGE & FAM. 505, 509 (1998).

<sup>85</sup> Brown & Booth, *supra* note 60, at 668–69.

<sup>86</sup> Bumpass, *supra* note 41, at 493.

<sup>87</sup> Rindfuss & VandenHeuvel, *supra* note 6, at 707, 721–22.

<sup>88</sup> See, e.g., Duncan, *supra* note 1, at 1005–06, 1024–25.

<sup>89</sup> Bumpass & Sweet, *supra* note 9, at 620.

“dissolved”? The NSFH data showed that 60% of first cohabitations were likely to end in marriage, with 25% of cohabitants marrying within a year and 50% of them within three years.<sup>90</sup> A more recent article indicates that the percent ending in marriage within three years dropped to about 33% in the 1990s.<sup>91</sup>

Data from the CDC, based on the 1995 National Survey of Family Growth, set up the comparison differently. Under the CDC definition, marriage does not constitute dissolution; the cohabiting union is only dissolved if the couple subsequently divorce.<sup>92</sup> Using this definition, the probability that a woman’s first cohabitation will dissolve within three years is 39%, 49% within five years, and 62% in ten years.<sup>93</sup> This would lead to different conclusions about the stability of the partners’ relationship, if almost four in ten are still together, married or not, after ten years. (Of course, we need not worry about legal remedies for the cohabitants who have transformed their relationships into marriage.) Even after adding together the time of cohabitation and of marriage, however, there is still a significantly greater hazard of dissolution for a cohabitation than a marriage.<sup>94</sup> (The divorce rate has hovered at about 50% since 1980.<sup>95</sup>)

These rates contrast with the pattern in other areas of the industrialized world. In the United Kingdom and in Quebec, for example, cohabitation is longer in duration; a recent large-scale survey in the U.K. showed that the average duration of cohabiting unions had increased to 6.5 years, with the median more than four years.<sup>96</sup> The median duration of cohabitation by previously unmarried women aged 15 to 44 in France is 4.28 years.<sup>97</sup>

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<sup>90</sup> *Id.* at 621.

<sup>91</sup> Cherlin, *supra* note 31, at 849 (citing Pamela J. Smock & Sanjiv Gupta, *Cohabitation in Contemporary North America*, in JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY 53 (Alan Booth & Ann C. Crouter eds., 2002)).

<sup>92</sup> CDC, *supra* note 56, at 7.

<sup>93</sup> *Id.* at 49, tbl. 15.

<sup>94</sup> See also DeMaris & Rao, *supra* note 17, at 189.

<sup>95</sup> NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES, *supra* note 30, at 4; see also William M. Pinsof, *The Death of “Till Death Us Do Part”: The Transformation of Pair-Bonding in the 20th Century*, 41 FAM. PROCESS 135, 142–43 (2002) (concluding that a 50% divorce rate fits “the evolved human level of monogamous marital stability”). The probability that a first marriage will end in divorce by the 20th year is estimated at .48 for non-Hispanic whites, .63 for blacks, and .52 for Hispanics. *Id.* at 139.

<sup>96</sup> Of those surveyed, 47% had been together five years or more and 23% over ten years. Anne Barlow & Grace James, *Regulating Marriage and Cohabitation in 21st Century Britain*, 67 MOD. L. REV. 143, 154, 159 (2004); see also Celine Le Bourdais & Évelyne Lapierre-Adamcyk, *Changes in Conjugal Life in Canada: Is Cohabitation Progressively Replacing Marriage?*, 66 J. MARRIAGE & FAM. 929, 934 (2004) (reporting that cohabitations in Quebec are of longer duration and less likely to turn into marriage).

<sup>97</sup> Heuveline & Timberlake, *supra* note 21, at 1223, tbl. 2 (reporting a range of median duration from 1.78 years in Switzerland to 4.28 years in France).

The rate of instability in the United States may in fact be increasing. A 2000 article by Larry Bumpass and Hsien-Hen Lu, based on Cycle 5 of the National Survey of Family Growth (1995), found a substantial increase in the instability of cohabiting unions.<sup>98</sup> The change resulted from the decreasing probability of cohabitants' marrying their cohabiting partner; marriages following cohabitation also appeared to have become less stable.<sup>99</sup>

A very important point that can be missed in the aggregate data is that the stability, like the rate, of cohabitation differs by subgroups of the population. The average duration of a cohabiting union is longer, for example, for persons who have previously been married.<sup>100</sup> This is also so for cohabitants who are older. CDC data show that women who are older at the start of a cohabiting union (25 or over) are less likely to experience disruption of the relationship,<sup>101</sup> indicating that at least some of the divorces that statistically would have resulted from early marriage have shifted into the statistics about cohabitation instead.<sup>102</sup> The probability of disruption (under the CDC definition) is also higher in communities with high unemployment: 76% of African American cohabitants in communities of high unemployment breakup within ten years, as compared with 57% of non-Hispanic whites living in areas of low unemployment.<sup>103</sup> In addition, the probability that a first cohabitation will transition to marriage within five years is 75% for non-Hispanic white women, 61% for Hispanic women, and 48% for African Americans.<sup>104</sup> In short, if you are older, a member of the dominant racial or ethnic group, and have more money, you are more likely to make a long-term success of *either* cohabitation or marriage.<sup>105</sup>

Raley and Bumpass, using data from the 1995 NSFG, confirm this variability of duration by groups within the population. Their analysis shows a 15% increase in the instability of first unions for African American women between the 1980–86 and 1987–94 cohorts, a slight increase in instability for non-Hispanic white

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<sup>98</sup> Bumpass & Lu, *supra* note 24, at 33. The National Survey of Family Growth is a periodic survey by the National Center for Health Statistics; Cycle 5 consisted of interviews averaging 105 minutes in 1995 with 10,847 women aged 15–44. *Id.* at 30.

<sup>99</sup> *Id.* at 33 (reporting that the proportion of cohabitants who had separated by ending either their cohabitation or subsequent marriage by the five-year mark had increased from 45% to 54%).

<sup>100</sup> Brown & Booth, *supra* note 60, at 671.

<sup>101</sup> CDC, *supra* note 56, at 16, figs. 13 & 28.

<sup>102</sup> R. Kelly Raley & Larry Bumpass, *The Topography of the Divorce Plateau: Levels and Trends in Union Stability in the United States after 1980*, 8 DEMOGRAPHIC RES. 245, 246 (2003).

<sup>103</sup> CDC, *supra* note 56, at 17, fig. 17 (defining disruption as a breakup either of the cohabitation or of the subsequent marriage).

<sup>104</sup> *Id.* at 12.

<sup>105</sup> The probability that a first marriage in a black low-income community will breakup within ten years is 56%, compared with 23% for high-income, non-Hispanic whites. *Id.* at 20, fig. 27.

women, but a decrease for Hispanic women, whose unions appear to be lasting longer.<sup>106</sup>

Similarly, the generalized finding, oft repeated, that premarital cohabitation increases the rate of subsequent divorce looks different when deconstructed. The conclusion usually drawn from the correlation of cohabitation and subsequent divorce is that cohabitation, touted as a way to try out candidates for marriage, is not a very good screening mechanism.<sup>107</sup> However, the correlation between cohabitation and divorce is not very significant for persons who cohabit only with the person they subsequently marry, as the vast majority do.<sup>108</sup> Other studies confirm that premarital cohabitation with the subsequent spouse is not associated with a higher risk of divorce.<sup>109</sup> The implication is that it is only persons who engage in multiple cohabiting relationships prior to marriage who are a bad risk.

Studies from other countries show that initial findings of correlation between cohabitation and subsequent divorce may also have been tied to the fact that cohabitation was not as widespread as it is today. In periods, and areas, where cohabitation has become broadly accepted and is characteristic premarital behavior, this correlation disappears or even becomes negative.<sup>110</sup> In Denmark, Sweden, Norway, Austria, West Germany, Belgium, Greece, and New Zealand, there is a *negative* correlation between premarital cohabitation and subsequent divorce.<sup>111</sup> In short, cohabitation does seem to be working as a screening device for marital partners in those countries; it appears to improve a couple's chance of avoiding divorce. Many of these are also countries where social welfare policies make the economic welfare of cohabitants easier. Married or not, couples receive basic economic supports, so that their improved stability may be linked to the generalizations about financial well-being and union duration described above.

In sum, the received wisdom about the stability and duration of cohabiting unions upon which law reviews and many social scientists have relied is in fact too simple. Reality is much more complicated. It depends who is cohabiting, how old they are, and what their life circumstances may be, particularly their economic well-being.

Nonetheless, cohabitation is likely to be shorter in duration on average than marriage and thus more likely to result in disruption of the household unit.<sup>112</sup> Scholars have debated whether the characteristics of persons attracted to

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<sup>106</sup> Raley & Bumpass, *supra* note 102, at 251–52, tbl. 2.

<sup>107</sup> DeMaris & Rao, *supra* note 17, at 178.

<sup>108</sup> *Id.* at 179; Thomson & Colella, *supra* note 17, at 259.

<sup>109</sup> Jay Teachman, *Premarital Sex, Premarital Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 J. MARRIAGE & FAM. 444, 453 (2003).

<sup>110</sup> Svarer, *supra* note 13, at 533–34. *See also* Le Bourdais & Lapierre-Adamcyk, *supra* note 96, at 937 (reporting that couples in Quebec who cohabited prior to marrying have marriages that are as stable as others who did not).

<sup>111</sup> Svarer, *supra* note 13, at 532, tbl. 3.

<sup>112</sup> For the population as of 2001, first marriages that ended in divorce lasted a median of eight years. NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES, *supra* note 30, at 9.

cohabitation make them breakup (the selection hypothesis), whether the institution itself is inherently unstable, or whether the experience of cohabitation itself leads to instability.<sup>113</sup> For all the paper spent on this debate, there is no definitive answer. It is clear that cohabitation by persons who are not very good prospects for marriage explains some of the difference, but this may be for a variety of reasons. Some cohabitants may be difficult or disturbed people who cannot sustain a relationship. Others may be men in a state of semi-permanent unemployment. Some may be women who evaluate the men in their community as too risky for long-term commitments. Others may not want to commit very deeply to another human being, or—perhaps more common—one member of the pair does not. On the other hand, other groups of cohabitants may not have characteristics that would select for instability. Some may simply prefer a relationship without the historical baggage, especially the gender role baggage, of marriage, yet be just as committed to their partners as those in a traditional marriage setting. And others may just get into the arrangement and not feel any need to change its parameters, whether from inertia, satisfaction, or a realization that they are benefiting from it economically, even at the cost of the other partner.

This is far from an exhaustive list of possibilities. The point I am making is that the instability of cohabitation as an institution says something about the people involved and less about the institution itself, but that what it says about the people is extremely varied. I am not very interested in the selection debate, because it seems beside the point. If people fail to sustain long-term cohabiting unions, the following questions seem more important to me: What should the legal system do to address the situation of the persons affected when these relationships fail? And would a different legal environment perhaps stabilize some of these unions, even leading some of the partners to marry? These are questions to which I turn in Part II, below, after discussing aspects of the dynamics of the institution of cohabitation.

#### *D. Economics*

The economics of cohabitation are important to my analysis in a number of ways, including: (1) the specialization of labor within the relationship; (2) the impact of the economic resources of each partner upon entry into cohabitation or marriage; (3) the management of money within the union; and (4) the impact of cohabitation upon the economic well-being of the parties. All of these are relevant to the logic and the justice of our legal treatment of cohabitants both during and upon dissolution of their unions.

Many articles still begin with a discussion of Gary Becker's decades-old economic theory of marriage, to the effect that marriage is a rational choice when

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<sup>113</sup> See, e.g., Thomson & Colella, *supra* note 17, at 259–60 (describing literature on selection up to that date); Brines & Joyner, *supra* note 18, at 333–34; Smock, *supra* note 14, at 6–7.

there are benefits to both partners from the specialization of labor.<sup>114</sup> In addition to economies of scale, Becker theorized that both parties benefit from a traditional gender-based division of labor, with the wife working primarily within the home.<sup>115</sup> Family law then protects the parties' joint investment, and the law's failure to give comparable protection to cohabitants makes any specialization and investment in their unions risky.<sup>116</sup>

A gendered division of labor does in fact appear to be more characteristic of marriage, while cohabitation may be linked to a somewhat more equal division of labor within the household.<sup>117</sup> Female cohabitants also contribute more to the family income than do wives: one study reported that women cohabitants earn 90% of their partners' income, while wives earn 60%.<sup>118</sup> Indeed, economic equality between the partners appears to stabilize cohabitation, while it may destabilize marriage.<sup>119</sup> Under theories following Becker, women's economic independence, resulting from their entry into the work force, has caused the decline in the marriage rate.<sup>120</sup>

The world has changed a good deal, for both married couples and cohabitants, since Becker's treatise about the family was published in 1981.<sup>121</sup> Women, including the mothers of small children, have entered the workforce in record numbers.<sup>122</sup> By 1997 only one quarter of all couples had a single earner.<sup>123</sup> Most families depend for their basic welfare upon the income of both partners.<sup>124</sup> In married couples, wives contributed 26.6% of the family income in 1970, and

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<sup>114</sup> See, e.g., Brines & Joyner, *supra* note 18, at 334; Clarkberg, *supra* note 49, at 948.

<sup>115</sup> See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 14–37 (1981).

<sup>116</sup> Brines & Joyner, *supra* note 18, at 335–36.

<sup>117</sup> See, e.g., South & Spitze, *supra* note 19, at 340 (reporting gender gap among married couples as greater than that among cohabiting couples); cf. Gupta, *supra* note 19, at 708 (reporting that transition from cohabitation to marriage does not affect men's or women's housework time).

<sup>118</sup> Brines & Joyner, *supra* note 18, at 341.

<sup>119</sup> *Id.* at 347–48.

<sup>120</sup> Clarkberg, *supra* note 49, at 964; Becker, *supra* note 115, at 230–31, 248–49.

<sup>121</sup> Andrew J. Cherlin argues that this changed world calls for the replacement of the Becker “gains-to-trade” paradigm with one of bargaining, with women beginning from a substantially stronger bargaining position. Andrew J. Cherlin, *Toward a New Home Socioeconomics of Union Formation*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION, *supra* note 3, at 126, 139.

<sup>122</sup> The percentage of women in the U.S. labor force went from 43.3% in 1970 (versus 79.7% of men) to 59.2 % in 2004 (versus 73% of men). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 8, tbl. 2 (2005), available at <http://www.bls.gov/cps/wlf-databook2005.htm>.

<sup>123</sup> Linda J. Waite, *The Family as a Social Organization: Key Ideas for the Twenty-first Century*, 29 CONTEMP. SOC. 463, 464 (2000).

<sup>124</sup> See Smock & Manning, *supra* note 43, at 338 (1997) (citing several articles which document the growing importance of women's earnings to married couples).

35.2% by 2003.<sup>125</sup> There is evidence that intra-household specialization, in the sense of a wife working at home and her husband in the market economy, is decreasing even more among recent birth cohorts.<sup>126</sup> In short, the gender-specialized marriage, for reasons both of economics (the difficulty of supporting a family on one income) and of ideology (the increasing belief in gender equality), seems rapidly to be disappearing.<sup>127</sup> The specialization that takes place in most marriages is now confined to women's performance of the "Second Shift."<sup>128</sup>

How is this relevant to the rise of cohabitation and the decline in marriage? If specialization of labor were the economic bargain that Becker's marriage seekers were trying to strike, one would assume that men's economic resources would correlate positively with marriage and that women's would not. This is simply another way of stating the thesis that women's economic independence is responsible for the fall in the marriage rate. This thesis did not survive the NSFH study, which showed that women's economic resources appear to have no correlation with marriage.<sup>129</sup> A positive correlation between marriage and a variety of income variables for both men and women has been confirmed in many other studies.<sup>130</sup> The author of one study based on the 1972 High School Class longitudinal data drolly commented that there were good reasons for high-earning women to be attracted more to cohabitation than to marriage because it was hard for them to attract a "wife":

Women appear to be simply less able than men to trade high earnings for the household labor of a spouse, given the pervasive social expectations that wives will specialize in the household sphere of labor. To preserve their earnings, high-wage women may be looking for another type of bargain—a union with less specialized roles and expectations. Alternatively, potential husbands may be reluctant to

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<sup>125</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 65, tbl. 24 (2005), available at <http://www.bls.gov/cps/wlf-databook2005.htm>; see also Carolyn Vogler, *Cohabiting Couples: Rethinking Money in the Household at the Beginning of the Twenty First Century*, 53 SOC. REV. 1, 9 (2005) (reporting that market participation of women in the U.K. in 2002 was 74%, compared to 84% for men, and that they contributed one-third of the average couple's income).

<sup>126</sup> Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263, 266 (2004).

<sup>127</sup> See, e.g., Thornton & Young-DeMarco, *supra* note 26, at 1014–16, 1032 (noting increasing endorsement of gender equality in the American population).

<sup>128</sup> See ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989) (describing how women perform a disproportionately large share of household labor in addition to their work in the market economy).

<sup>129</sup> Smock & Manning, *supra* note 43, at 338.

<sup>130</sup> See Smock, Manning & Porter, *supra* note 51, at 682–83, tbl. 1 (summarizing studies of effects of economic variables on marriage).

choose high-earning wives, leading these women to seek alternatives for romantic unions.<sup>131</sup>

Given how difficult it can be to survive economically these days, it would be surprising if men did not welcome the added income of a well-paid spouse. The fact that the rate of marriage is currently highest for high-income and highly-educated women demonstrates that “increases in female economic independence are not leading women to ‘buy out’ of marriage. . . . [M]arriage levels . . . [are] . . . highest for those women who are, in theory, most able to live well alone . . . .”<sup>132</sup> In short, if Becker’s marriage bargain based on economic specialization was once true, the relationship of the economic resources of the male and female partners to their propensity to marry appears to have changed.

The management of money within cohabiting households is also relevant to their legal treatment. Numbers of early studies concluded that cohabitants did not pool their resources the way married couples did and thus should be treated as separate individuals rather than as an economic unit.<sup>133</sup> Law review authors have leapt upon the generalization that cohabitants do not pool their incomes to justify denial of legal remedies to them upon dissolution, on the ground that they do not become economically interdependent during their relationships.<sup>134</sup>

More sophisticated recent studies about how cohabitants manage money within their relationships call into question these earlier generalizations and the conclusions drawn from them. It is true that cohabitants are somewhat less likely than married couples to pool their income.<sup>135</sup> However, a majority of both cohabitants and married couples *do* maintain joint finances. A comparative study of the internal economic relationships of married and cohabiting couples in the United States and Sweden found that only 47.9% of cohabitants in Sweden and 45.7% in the United States kept their money separate.<sup>136</sup> In other words, almost 55% *do* join their incomes. Another large-scale U.S. study reported that 73% of married couples and 52% of cohabitants shared income in a common pot even if they did not pool every cent; an additional 24% split expenses fifty-fifty although they did not pool their income, yielding an overall 75.3% of cohabitants who were

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<sup>131</sup> Clarkberg, *supra* note 49, at 957.

<sup>132</sup> Goldstein & Kenney, *supra* note 17, at 517.

<sup>133</sup> See, e.g., Winkler, *supra* note 18, at 1089; Sassler & McNally, *supra* note 69, at 556.

<sup>134</sup> See, e.g., Duncan, *supra* note 1, at 1007; Garrison, *supra* note 1, at 840, 845–46, 875.

<sup>135</sup> See, e.g., Vogler, *supra* note 125, at 12–13.

<sup>136</sup> Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples’ Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 533 (2003). The comparable percentages for married couples were 30.1% in Sweden and 17.4% in the United States. *Id.* at 532.



substantially interdependent economically (versus 83.2% of married couples in the study).<sup>137</sup>

Another study reports that there is no difference at all in the allocative system employed by married couples and cohabiting couples if they have a biological child.<sup>138</sup> Further examination reveals that the difference between cohabitants with biological and “step” children in the family unit may be small and that male cohabitants’ incomes are available to their partners even in families where the men have no biological relationship to the children.<sup>139</sup>

In short, despite the comparatively brief duration of cohabiting unions in this country and lack of legal protections, which make income sharing very risky, the majority of cohabitants do so nonetheless.<sup>140</sup> A large-scale survey of cohabiting couples in the United Kingdom which involved qualitative interviews showed similar results. Despite the variety of types of relationships and commitments described to them, the authors found that there was “clear evidence of financial dependence and interdependence during relationships, particularly where there are children.”<sup>141</sup>

As the statistics above show, about half of cohabitants still do keep their money separate rather than pooling it, with each contributing to the joint household in some way. This behavior appears rational from an economic point of view, given the legal insecurity of long-term investments in these unions. One scholar points out that economic behavior following a principle of strict equality of contribution—fifty-fifty rather than “from each according to his ability, to each according to his need”<sup>142</sup>—may be the quite rational result of this insecurity. In other words, the cohabitants keep their money separate because the legal status of cohabitation is unprotected, rather than, as some have suggested, cohabiting because of an individualistic predisposition that leads them *both* to cohabit and to maintain separate finances.<sup>143</sup>

If the cohabitants’ contributions to the household are both monetary and their incomes roughly equal, there may be no reason to worry about the possibility of exploitation or vulnerability if the relationship ends. Reality, again, is not so simple. An ideology of equality, defined as equal contribution, may mask

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<sup>137</sup> Catherine Kenney, *Cohabiting Couple, Filing Jointly? Resource Pooling and U.S. Poverty Policies*, 53 FAM. REL. 237, 243–45 (2004). Kenney relies on the Fragile Families and Child Wellbeing Study, an ongoing study of a birth cohort of unmarried parents and their children in U.S. cities with more than 200,000 population; this data is therefore not representative but suggestive.

<sup>138</sup> Vogler, *supra* note 125, at 13.

<sup>139</sup> Kenney, *supra* note 137, at 244.

<sup>140</sup> In Sweden, cohabitants not only have the protections given to all individuals by the social welfare state but are also entitled to allocation of their accumulated property upon dissolution. See Heimdal & Houseknecht, *supra* note 136, at 527.

<sup>141</sup> Barlow & James, *supra* note 96, at 156.

<sup>142</sup> Karl Marx, *Critique of the Gotha Programme*, in THE MARX-ENGELS READER 383, 388 (Robert C. Tucker ed., 1972).

<sup>143</sup> Brines & Joyner, *supra* note 18, at 350–51.

substantial inequality if the male and female partners' incomes are not equal.<sup>144</sup> In fact, women not only earn less on average than men but are also more likely to spend what they earn for food and other household needs, leading the author of one study to comment:

[A]s long as spending on the home and family is constructed as the woman's responsibility, allocative systems in which money is kept partly or completely separate can easily end up in practice operating rather like the traditional housekeeping allowance system, except that the female partner uses her own earnings rather than being given an allowance by the male partner.<sup>145</sup>

Other scholars point out that women's care for and connection with children disadvantage them in bargaining with men for the best "deal."<sup>146</sup> In short, we need to be concerned about exploitation and vulnerability whether cohabitants pool their resources or not.

Finally, what is the impact of cohabitation upon the economic welfare of the partners? As should be clear from the disparity of groups who cohabit, no global statement can be made on this score. Men gain in most cohabiting relationships by being relieved of the necessity of support: female cohabitants make substantial financial contributions to the household and may even give more than their share (as many African American mothers living with unemployed men may do). Women may gain too. One recent study comparing the effects of marriage and cohabitation on total family income concluded that women gain a virtually identical income premium whether they cohabit or marry—a gain of roughly 55% in needs-adjusted total family income.<sup>147</sup> Yet another study reports that children whose parents have divorced experience an increase of about \$6,000 in their median adjusted family income if their custodial parent *either* remarries *or* cohabits.<sup>148</sup> In other words, remarriage and cohabitation are equivalent in their ability to restore family income to pre-divorce levels.<sup>149</sup>

In sum, it is clear that cohabitants become economically interdependent during their unions. Thus cohabitation has substantial economic effects and doubtless leads to changes in economic behavior—we lawyers might say reliance—on the part of the partners. As a result, the dissolution of cohabiting

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<sup>144</sup> Vogler, *supra* note 125, at 20.

<sup>145</sup> *Id.* at 23.

<sup>146</sup> See Cherlin, *supra* note 121, at 133 ("[W]omen do not bargain as far toward the margins of their power as men do." (quoting Paula England & Barbara Stanek Kilbourne, *Markets, Marriages, and Other Mates: The Problem of Power*, in BEYOND THE MARKETPLACE 163, 171 (Roger Friedland & A.F. Robertson eds., 1990))).

<sup>147</sup> Light, *supra* note 126, at 279.

<sup>148</sup> Donna Ruane Morrison & Amy Ritualo, *Routes to Children's Economic Recovery After Divorce: Are Cohabitation and Remarriage Equivalent?*, 65 AM. SOC. REV. 560, 570 (2000).

<sup>149</sup> *Id.* at 576.

unions has an impact upon the economic welfare of women and children comparable to that of divorce, leaving a substantial number of former cohabitants in poverty.<sup>150</sup> The impact on African American and Hispanic women can be particularly severe.<sup>151</sup>

### *E. Domestic Violence and Cohabitation*

Cohabitants are said to be much more likely to be victims of domestic violence than are married persons—twice as likely, according to Stets and Straus in a 1989 study that is often cited.<sup>152</sup> It is important to look carefully at the evidence on this issue. The earliest studies took place at a time when cohabitation was much less common than it is today. One, based on a 1976 survey, included only forty cohabitants in its randomized sample of 2,143 heterosexual coupled adults between the ages of 18 and 70.<sup>153</sup> The study concluded that the rate of violence among cohabitants was higher than among married persons, although “those who are over 30, divorced women, those with high incomes, and those who had been together for over ten years, had very low rates of violence,” less than their married counterparts).<sup>154</sup> The 1989 study by Stets and Straus was based on 237 cohabitants and 5,005 married couples, a much lower statistical proportion than would obtain if a randomized sample were run today.<sup>155</sup> It found violence to be both more common and more severe among cohabitants—35% of cohabiting couples versus 15% of married couples reported a physical assault during the previous year.<sup>156</sup>

A 1998 article points out, however, that when Stets and Straus’ data is controlled for age, the differential assault rate changes to 36% of married couples

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<sup>150</sup> Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 324 (2005).

<sup>151</sup> *Id.*

<sup>152</sup> Jan E. Stets & Murray A. Straus, *The Marriage License as a Hitting License: A Comparison of Assaults in Dating, Cohabiting, and Married Couples*, in VIOLENCE IN DATING RELATIONSHIPS: EMERGING SOCIAL ISSUES 33, 39 (Maureen A. Pirog-Good & Jan E. Stets eds., 1989); see also MARTIN DALY & MARGO WILSON, HOMICIDE 213–15 (1988) (reporting higher rates of victimization in common law marriages in Canada between 1974 and 1983); Nicky Ali Jackson, *Observational Experiences of Intrapersonal Conflict and Teenage Victimization: A Comparative Study Among Spouses and Cohabitors*, 11 J. FAM. VIOLENCE 191, 197 (1996) (reporting that cohabitators among 1985 National Family Violence Resurvey encountered more violence than spouses given similar patterns of childhood victimization).

<sup>153</sup> Kersti Yllo & Murray A. Straus, *Interpersonal Violence Among Married and Cohabiting Couples*, 30 FAM. REL. 339, 342 (1981).

<sup>154</sup> *Id.* at 345 (emphasis added).

<sup>155</sup> Stets & Straus, *supra* note 152, at 36. Cohabitants were less than 5% of the sample, whereas they made up 9% of coupled households in the 2000 census. MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS, *supra* note 22, at 3.

<sup>156</sup> Stets & Straus, *supra* note 152, at 38.

versus 40% of cohabiting couples.<sup>157</sup> This makes sense, given that victims of domestic violence tend to be disproportionately younger; and with the rising age of marriage, these are the persons who are most likely to be cohabitants.<sup>158</sup> The rate of domestic violence is also higher among subgroups of the population who are more likely to cohabit, such as African Americans and lower-income persons.<sup>159</sup>

Official estimates based on statistics of violent crimes in the United States show that 2.6 per 1,000 married women were victims of non-lethal domestic violence between 1993 and 1998, versus 11.3 per 1,000 never-married women.<sup>160</sup> However, the Bureau of Justice Statistics' (BJS) category "never-married women" includes intimates who are not in fact living together, so it is not coextensive with cohabitants. Further, by far the highest rate of victimization—31.9 per 1,000—is among yet a third category, that of divorced or separated women.<sup>161</sup> Most divorced and separated women can in fact be seen as a subcategory of married women, and battery is most common when women separate from their spouses.<sup>162</sup> Thus these statistics do not unproblematically support the frequent generalization that domestic violence is more common among cohabitants than among married couples.

Nonetheless, there is fairly solid evidence that the most severe type of domestic violence, femicide, is more common among cohabitants than among married couples. Several recent studies have reported that the rate of homicide is much higher among intimate partners who are not married. One study of the FBI homicide database for 1976–1994 reported that women in cohabiting relationships were about nine times more likely to be killed by their partners than women in marital relationships and that the rates were higher for middle-aged than for

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<sup>157</sup> Lynn Magdol, Terrie E. Moffit, Avshalom Caspi & Phil A. Silva, *Hitting Without a License: Testing Explanations for Differences in Partner Abuse Between Young Adult Daters and Cohabitators*, 60 J. MARRIAGE & FAM. 41, 53 (1998); see also Stets & Straus, *supra* note 152, at 42, tbl. 2.3.

<sup>158</sup> CALLIE M. RENNISON & SARAH WEICHANS, BUREAU OF JUSTICE STAT., INTIMATE PARTNER VIOLENCE 4, tbl. 6, 10, tbl. 5 (2002) (reporting that highest rates of intimate violence affected women aged 16 to 24) [hereinafter BJS 2002].

<sup>159</sup> *Id.* at 4, figs. 4 & 7, 10, tbl. 4 (reporting rate of non-lethal intimate partner violence for African American females as 11.1 per 1,000 and 8.2 per 1,000 for whites); *id.* at 10, tbl. 6 (reporting rate of domestic violence at 10.1 per 1,000 for females in households with income from \$15,000 to \$24,000; 12.3 per 1,000 for \$7,500 to \$14,999; and 20.3 per 1,000 for households with less than \$7,500; households above \$25,000 ranged from 3.3 to 7.8 per 1,000).

<sup>160</sup> *Id.* at 4, fig. 8, 11, tbl. 7.

<sup>161</sup> *Id.* at 11, tbl. 7.

<sup>162</sup> See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61–68 (1991) (describing the more intense violence that greets women who attempt to leave as "separation assault").

younger cohabitants.<sup>163</sup> This is surprising, given the BJS statistics on non-lethal violence cited above and the tendency for violence to decline with age.<sup>164</sup> Nonetheless, a Canadian study confirms that there is a much higher rate of intimate violence and femicide among cohabitants, reporting that cohabitants were twice as likely as married women to report experiencing violence and six times more likely to be killed by their partners than married persons between 1991 and 2000.<sup>165</sup> The Canadian study compared this femicide rate favorably with previous Canadian findings that cohabitants were *nine* times as likely as married women to become victims of intimate homicide and hypothesized that, as cohabitation has become more common and thus selection bias has decreased, the rates are converging.<sup>166</sup>

Attempts to explain the differential rates of violence between cohabiting and married couples have not been very satisfying. One early hypothesis was that cohabitants were more socially isolated, but a 1991 study testing this theory found that cohabitants were in fact more, rather than less, likely than married persons to be linked with and supported by their family and friends.<sup>167</sup> More recent explanations have focused upon the insecurity of the cohabiting relationship, which authors suggest may call forth compensatory domineering violence by insecure males.<sup>168</sup>

The connection between domestic violence and cohabitation thus remains somewhat mysterious. Anomalies present themselves, such as the fact that rates of domestic violence have been decreasing in both the United States and Canada during the period when the rate of cohabitation has been going up.<sup>169</sup> In Canada, moreover, the lowest rates of domestic violence coexist, in Quebec, with the highest rate of cohabitation.<sup>170</sup> Yet if 2,000 cohabiting women were killed by their

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<sup>163</sup> Todd K. Shackelford, *Cohabitation, Marriage, and Murder: Woman-Killing by Male Romantic Partners*, 27 AGGRESSIVE BEHAV. 284, 287–88 (2001) (reporting femicide rates as highest for ages 35–64).

<sup>164</sup> The Bureau of Justice Statistics also reports that of all women murder victims from 1976 to 1996, 18.9% were killed by husbands versus 9.4% by non-married intimate partners. LAWRENCE A. GREENFELD ET. AL., BUREAU OF JUSTICE STAT., VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 6 (1998). These are percentages, however, not rates; and there are many more married than non-married individuals in the total number.

<sup>165</sup> Douglas A. Brownridge, *Understanding Women's Heightened Risk of Violence in Common-Law Unions: Revisiting the Selection and Relationship Hypotheses*, 10 VIOLENCE AGAINST WOMEN 626, 627, 645 (2004).

<sup>166</sup> *Id.* at 645–48.

<sup>167</sup> Jan E. Stets, *Cohabiting and Marital Aggression: The Role of Social Isolation*, 53 J. MARRIAGE & FAM. 669, 676 (1991).

<sup>168</sup> See, e.g., Shackelford, *supra* note 163, at 290; Brownridge, *supra* note 165, at 647.

<sup>169</sup> Brownridge, *supra* note 165, at 631; BJS 2002, *supra* note 158, at 1 (reporting that “the rate of intimate partner violence [in the U.S.] fell from 9.8 to 7.5 per 1,000 women” over the period from 1993 to 1997).

<sup>170</sup> Brownridge, *supra* note 165, at 648.

partners in the United States between 1976 and 1994,<sup>171</sup> this is undeniably a social problem of grave proportions.

*F. Quality: The Partners*

By now we all know that marriage is good for you: it supposedly results in higher earnings, less depression, less alcoholism, less violence, and more all-around happiness.<sup>172</sup> All of these correlations are subject to some question, of course, given that persons in better economic circumstances are much more likely than others to get married in the first place; many scholars argue that the enhanced well-being of married couples compared to cohabitants in fact rests upon their higher socioeconomic status.<sup>173</sup> Yet there still seems to be evidence that the institution of marriage itself confers benefits upon the health and welfare of its denizens.<sup>174</sup> What about cohabitation? The record is mixed.

There are numerous studies comparing the mental health of cohabiting partners with that of married couples. The results are conflicting, as are the conclusions drawn from them. For example, one study comparing the mental health of young adult cohabitants with that of unmarried and married persons found no differences between cohabitants and others in levels of depression but did report more alcohol problems among cohabiting men.<sup>175</sup> The authors also noted that “[h]igh levels of financial need are especially likely to be related to alcohol problems among cohabiting men,” so it’s not clear what is causing what.<sup>176</sup>

According to yet another study, based on NSFH data, cohabitants report substantially higher levels of depression than their married counterparts, net of socio-demographic factors.<sup>177</sup> The longer the duration of cohabitation, the more the depression, which the author attributes to increased levels of relationship instability.<sup>178</sup> She concludes that “there is no evidence for selection of the psychologically unhealthy into cohabitation,”<sup>179</sup> attributing cohabitants’ higher

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<sup>171</sup> Shackelford, *supra* note 163, at 285.

<sup>172</sup> See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY passim* (2000). For a summary of the benefits of marriage, see Waite, *supra* note 123, at 465.

<sup>173</sup> See Susan L. Brown, *The Effect of Union Type on Psychological Well-Being: Depression Among Cohabitors Versus Marrieds*, 41 J. HEALTH & SOC. BEHAV. 241, 243 (2000), which cites several related articles.

<sup>174</sup> See, e.g., Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARRIAGE & FAM. 527, 534 (1998) (reporting that “[m]arriage was 3.4 times more closely associated with the variance of happiness than was cohabitation[,]” in part because of health and economic benefits and in part due to emotional support).

<sup>175</sup> Horwitz & White, *supra* note 84, at 510–11.

<sup>176</sup> *Id.* at 511.

<sup>177</sup> Brown, *supra* note 173, at 247, 253.

<sup>178</sup> *Id.* at 247–48.

<sup>179</sup> *Id.* at 252–53.

depression levels to the institution itself. In short, studies about cohabitation and depression are conflicting.<sup>180</sup>

What of the overall happiness enjoyed by cohabitants? One oft-cited 1995 article by Steven L. Nock, based on NSFH data, found that there was no significant difference between married and cohabiting couples on frequency of disagreements but that cohabitants reported significantly lower levels of happiness.<sup>181</sup> Nock argued that the poorer quality of their relationships was caused by cohabitation's lack of institutionalization and the concomitant lack of clear normative standards governing it.<sup>182</sup> This result is consistent with the idea that the institution of marriage *per se*, rather than the selection of individuals into it, results in increased psychological well-being.

Another major study, also using NSFH data, confirmed that cohabitants report poorer relationship quality, controlling for relationship duration and demographic characteristics.<sup>183</sup> Yet its authors, Brown and Booth, found that cohabitants with plans to marry did not differ significantly from married couples on this measure.<sup>184</sup> Since nearly 75% of cohabitants report plans to marry (though only 53% actually do so),<sup>185</sup> this substantially undercuts generalizations about cohabitation and the quality of relationships. Because a majority of cohabitants enjoyed this higher relationship quality even prior to marriage (because a majority plan to marry), marriage *per se* could not be responsible for those benefits.<sup>186</sup> On the other hand, cohabitants who do not marry experience an escalation of conflict, although "[c]loser inspection reveals that some long-term cohabitators enjoy levels of relationship quality that are not unlike those of their counterparts who marry."<sup>187</sup> The intact unions Brown studied in the two-wave NSFH data were only those that had survived as long as seven years, a very select group, given that only one in ten lasts beyond five years according to that dataset; and Brown admitted that "[a] less select group of cohabitators may have higher relationship quality, on average, both before and after marriage."<sup>188</sup> In short, the evidence on relationship

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<sup>180</sup> See also Laura Stafford, Susan L. Kline & Caroline T. Rankin, *Married Individuals, Cohabitors, and Cohabitors Who Marry: A Longitudinal Study of Relational and Individual Well-being*, 21 J. SOC. & PERS. RELATIONSHIPS 231, 236 (2004) (describing conflicting studies about depression and cohabitation).

<sup>181</sup> Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 69 (1995).

<sup>182</sup> See *id.* at 55–56.

<sup>183</sup> Brown & Booth, *supra* note 60, at 677.

<sup>184</sup> *Id.* Brown's later research demonstrated that cohabitants' assessment of the quality of their relationships was, not surprisingly, associated with their odds of separating or of marrying. See Brown, *supra* note 8, at 843.

<sup>185</sup> Susan L. Brown, *Moving From Cohabitation to Marriage: Effects on Relationship Quality*, 33 SOC. SCI. RES. 1, 2 (2004); Bumpass & Lu, *supra* note 24, at 33.

<sup>186</sup> Brown, *supra* note 185, at 16.

<sup>187</sup> *Id.* at 17.

<sup>188</sup> *Id.*

quality is confusing, with the aggregate statistics perhaps masking significant group differences.

Yet another analysis of the NSFH data, this time by scholars of communications rather than sociologists or demographers, concluded that the transition to marriage played little role in cohabitants' frequency of conflict or relational satisfaction.<sup>189</sup> Rather, these measures differed instead, in order of greater satisfaction with their relationships, among long-term married persons, cohabitants who married, and long-term cohabitants, thus lending support to the selectivity thesis.<sup>190</sup> Yet all of these analyses are based on the 1987–88 NSFH study; and we know that as cohabitation becomes more common, it is less vulnerable to selection effects in general.<sup>191</sup>

Despite conflicting studies and confusion about how to interpret the results, we do know a few things. Domestic violence is common among cohabitants, apparently more common than among married couples. Some proportion of cohabitants are unhappy with their relationships and may even be depressed, and their dissatisfaction may be related to the insecurity and instability of cohabitation. As various scholars admit, it is hard to tell what is cause and what is effect—whether lower quality relationships led to cohabitation or whether cohabitation adversely affected relationship quality.<sup>192</sup> This does not really matter, though, because we have no evidence that simply shifting the same individuals into marriage (were that possible) would help. What one article notes about the economic benefits of marriage may be true here as well: “[T]he benefits of marriage observed for people who are, in fact, married would not necessarily accrue to those who are not.”<sup>193</sup> Again, these data lead to the conclusion that our legal arrangements should simply address the situation as it is rather than as we wish it might be.

### *G. Impact on Children*

As soon as the NSFH data were available, the presence of children in cohabiting households became evident. Bumpass, Sweet and Cherlin reported that four out of every ten cohabiting couples had children present.<sup>194</sup> This fact did not surprise the authors, as they noted that among this group 20% of cohabitants were still together after five years.<sup>195</sup> The 1990 Census confirmed this 40% figure, comparing it with 46% of married-couple households that include children under

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<sup>189</sup> Stafford, Kline & Rankin, *supra* note 180, at 243.

<sup>190</sup> *Id.* at 243–44.

<sup>191</sup> See, e.g., Wilhelm, *supra* note 75, at 296; Manting, *supra* note 77, at 63.

<sup>192</sup> See, e.g., Thomson & Colella, *supra* note 17, at 266.

<sup>193</sup> Smock & Manning, *supra* note 22, at 103 (citing Pamela J. Smock, Wendy D. Manning & Sanjiv Gupta, *The Effect of Marriage and Divorce on Women's Economic Well-Being*, 64 AM. SOC. REV. 794 (1999)).

<sup>194</sup> Bumpass, Sweet & Cherlin, *supra* note 34, at 919.

<sup>195</sup> *Id.*



18.<sup>196</sup> After the 1990 census, it was possible to estimate the number of these children at 2.2 million, or 3.5% of all children in the United States.<sup>197</sup> In the 2000 Census, these figures had increased to 4.1 million children, or 6.3%.<sup>198</sup> About half of these children are the biological children of the cohabitants, and about half are the children of one of the cohabitants, typically of the woman.<sup>199</sup> However, these numbers, based on a "snapshot" of the population at one particular time, may underestimate the impact of cohabitation on children, as others report that two of every five children in the U.S. will spend time in a cohabiting household before the age of 16.<sup>200</sup>

It thus became obvious that many of the growing number of non-marital children in the U.S. were not living in single-parent families.<sup>201</sup> The numbers differ dramatically by race and ethnic group: 8% of Puerto Rican children, 5% of Mexican American and Black children, and 3% of non-Hispanic white children live in cohabiting families.<sup>202</sup> As noted above, cohabitation often has economic benefits for these children, though this of course varies with the resources of the adult partners. But a cohabitant's contribution could be very important to the 25% of children in cohabiting families whose mothers were receiving public assistance.<sup>203</sup> Puerto Rican children born into informal unions appear to benefit the most, with a gain of 51% over the resources that would be available to them in a single-female-parent family.<sup>204</sup>

Early studies examined the role of cohabitation in the rise of non-marital childbearing.<sup>205</sup> Again, they found that the impact differed by subgroup. While 59% of Puerto Rican and 40% of Mexican American non-marital births are to women in cohabiting unions, cohabitation appears to have minimal effect upon the childbearing of African Americans, who have the highest rate of non-marital births but relatively few of the children are born into cohabiting couples.<sup>206</sup> The authors of one study thus concluded that cohabitation has a significant effect on

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<sup>196</sup> MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS, *supra* note 22, at 10.

<sup>197</sup> Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well-Being*, 58 J. MARRIAGE & FAM. 998, 1008 (1996).

<sup>198</sup> U.S. CENSUS BUREAU, CHILDREN AND THE HOUSEHOLDS THEY LIVE IN: 2000, at 8, tbl. 3, 9 (2004).

<sup>199</sup> See, e.g., Gregory Acs & Sandi Nelson, "Honey, I'm Home." *Changes in Living Arrangements in the Late 1990s*, Urban Institute/New Federalism National Survey of America's Families, Washington, D.C. B-38, at 1; Rose M. Kreider & Jason Fields, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2001, at 5, tbl. 2.

<sup>200</sup> Bumpass & Lu, *supra* note 24, at 35.

<sup>201</sup> Before this reality sank in, studies did not distinguish between single and cohabiting mothers of non-marital children. Moffitt et al., *supra* note 61, at 259.

<sup>202</sup> Manning & Lichter, *supra* note 197, at 1002-03.

<sup>203</sup> *Id.* at 1003.

<sup>204</sup> *Id.* at 1006.

<sup>205</sup> See, e.g., Wendy D. Manning & Nancy S. Landale, *Racial and Ethnic Differences in the Role of Cohabitation in Premarital Childbearing*, 58 J. MARRIAGE & FAM. 63 (1996).

<sup>206</sup> *Id.* at 63, 74.

the rate of pregnancy among unmarried Puerto Rican women but that “the recent growth in cohabitation plays little role in explaining the dramatic increase in nonmarital childbearing among African American women.”<sup>207</sup> Perhaps more important, Puerto Rican children are much more frequently born into a two-parent unit—one in which their mothers may regard themselves as married<sup>208</sup>—and the addition of their unmarried father’s presence adds 51% to the child’s family income.

The problem—and it is a very big problem for children—is that cohabiting unions are less stable than marriages. In contrast to the early studies exploring the statistics about children in cohabiting unions and the possible relationship to the rise in the rate of non-marital births, more recent studies have focused upon the significance of these facts for the welfare of the children involved. We know that transitions in childhood living arrangements are very stressful for children, and the more transitions, the more stress.<sup>209</sup> The risk of a disruptive transition is much higher for children born to cohabiting parents, even if their parents subsequently marry, than for those born to married parents:

[T]he risk of parental disruption is 292% greater among children whose cohabiting parents do not marry than children born to married parents and 151% greater among children whose cohabiting parents marry than children born into marriage . . . .<sup>210</sup>

Of these children, 15% will experience the end of their parents’ relationship by the time they are one (versus 4% of children of married parents), 50% by the time they are five (versus 15% of children of married parents), and two thirds by the time they are ten.<sup>211</sup>

Again, the likelihood of disruption varies by subgroup, with 40% of Hispanic and non-Hispanic white children born to cohabiting couples, but 60% of comparable African American children, confronting this loss by age five.<sup>212</sup> Non-Hispanic white children born to cohabiting couples whose parents subsequently marry have rates of stability similar to those in married-couple families, however, while Black and Hispanic children do not.<sup>213</sup>

There are now also some studies of the actual long-term effects of parental cohabitation on these children. One study found that the impact varies with the age of the child at the time of the cohabitation, with adolescents experiencing more emotional and behavioral problems and six- to eleven-year-olds experiencing lower levels of engagement in school, after controlling for parental

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<sup>207</sup> *Id.* at 73–74.

<sup>208</sup> *Id.* at 66.

<sup>209</sup> See, e.g., Manning, Smock & Majumdar, *supra* note 20, at 136; Teachman, *supra* note 20, at 91 (citing numerous related articles).

<sup>210</sup> *Id.* at 151.

<sup>211</sup> *Id.* at 146.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 151.

economic resources.<sup>214</sup> However, the most important conclusion of this comparative study was that these negative impacts were not the result of cohabitation *per se*; they were shared by children of married parents who divorced and remarried. In other words, living in a married stepfamily was just as harmful:

[R]esiding outside a two-biological-parent married family can be negatively related to children's well-being. . . . [R]egardless of whether a parent remarries or forms a cohabiting stepfamily, child outcomes are similar.<sup>215</sup>

Given that at least one third of American children no longer live in married families with their biological parents,<sup>216</sup> public policy needs to be premised upon this reality and to focus upon improving the conditions encountered by these children in their real-world settings, which are relatively unstable and fraught with problems that improved economic resources may alleviate.

#### *H. What We Know: A Summary*

Let us summarize what we know from the social science before drawing implications for the treatment of cohabitants by the legal system. First, we know that there were at least ten million Americans in opposite-sex unmarried couple households in the year 2000, or 9% of all coupled households. The rate of growth of heterosexual cohabitation has been very rapid; and for a variety of reasons (economics, age cohort maturation, and intergenerational attitudinal change), it will continue to grow.

Second, we know that the groups involved are extremely varied. While unmarried cohabitation has spread throughout all social and economic groups, it is most pronounced among lower-income people, African Americans, Latinos (especially Puerto Ricans), and divorced persons. Most of these unions are short in term, with the median duration less than two years. However, at least 10% are long term, and this number may be increasing. If we include those who have transformed their unions into marriage, four out of ten couples are still together after ten years. Nonetheless, cohabiting unions are significantly less stable than marriage, and the percent of cohabitants who ultimately marry is decreasing. Cohabitation is less stable if the partners are young and/or poor.

Third, cohabitants are somewhat less gender-specialized in their households than married people (though married couples also are decreasingly so); the female partners are less confined to traditional gender roles and contribute more to the

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<sup>214</sup> Brown, *supra* note 20, at 364. It is important to control for parental economic resources because parental income has been shown to account for 50% of the negative effects of divorce upon children. Smock & Manning, *supra* note 22, at 94.

<sup>215</sup> Brown, *supra* note 20, at 364.

<sup>216</sup> CHILDREN AND THE HOUSEHOLDS THEY LIVE IN, *supra* note 198, at 9 (reporting that approximately two-thirds lived in married-couple family groups in 2000).

finances of the household. Although cohabitants are less likely than married couples to pool their income, the majority do so nonetheless; and virtually all of them do so if they have a child together. As several have commented, cohabitation is a different type of union than marriage,<sup>217</sup> but it still involves substantial economic interdependence for most cohabitants, with an accompanying potential for exploitation during the relationship and vulnerability at its dissolution.

Fourth, cohabitants are more likely to be victims of domestic violence than are married women.<sup>218</sup> Some cohabitants—those without plans to marry—are less satisfied with their relationships than married persons. Cohabitants may experience more depression, though the evidence is somewhat mixed on this score.

Finally, many children will live in cohabiting relationships at some point in their lives, and the lack of stability and other problems can have a negative impact upon their emotional and educational development. On the other hand, cohabitation yields a substantial income premium for a mother who would otherwise be a single or divorced parent, and economic resources can alleviate some of the negative effects of parental separation on children. In general, both partners and their children would be better off in long-term marriages. But this is not the world in which we live, for a variety of reasons unrelated to whether legal protection is granted to cohabitation or not—economic factors, gender role change, and higher expectations of marriage, for example.<sup>219</sup>

What are the implications of all these findings for the legal treatment of cohabitation? And what should we worry about in deciding whether to extend the benefits and burdens associated with marriage to cohabitants?

## II. WHAT ARE THE IMPLICATIONS OF THE SOCIAL SCIENCE FINDINGS?

In this section, I build upon the social science findings set out above. I discuss their implications for the vulnerability and potential exploitation of cohabiting partners, especially for women and children, and the concomitant need for a system of legal remedies. I then address arguments about the impact of

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<sup>217</sup> Sassler & McNally, *supra* note 69, at 574 (“a different kind of union”); Le Bourdais & Lapierre-Adamcyk, *supra* note 96, at 940 (describing cohabitation and marriage as two different forms of conjugal engagement). Other scholars have called cohabitation “a family status, but one in which levels of certainty about the relationship are lower than in marriage.” Bumpass, Sweet & Cherlin, *supra* note 34, at 926. Perhaps most accurately, Brown and Booth name it a “complex family form” to indicate the variety of types of unions—long- and short-term, with and without children—contained within it. Brown & Booth, *supra* note 60, at 668.

<sup>218</sup> Women are the overwhelming majority of victims of domestic violence. See BJS 2002, *supra* note 158, at 1.

<sup>219</sup> For a description of the changes in expectations of marriage over time, to today’s expectation of a personally fulfilling and emotionally satisfying relationship, see Cherlin, *supra* note 31, at 852–53; Marcia Carlson, Sara McLanahan & Paula England, *Union Formation in Fragile Families*, 41 DEMOGRAPHY 237, 242 (2004).

granting legal remedies to cohabitants upon the institution of marriage, finding that the fears often voiced are groundless.

*A. What We Should Worry About: Exploitation and Vulnerability*

The social science findings about cohabitation support the extension of legal protections to cohabitants. Cohabitation is likely, though not always, a less stable relationship than marriage, one that is more likely to involve domestic violence; and it involves substantial economic interdependence. A large number of individuals involved are likely to be poor, to come from disadvantaged racial or ethnic minorities, and to have children. All of these are powerful reasons to recognize their unions for purposes of government benefits, to extend a variety of legal remedies upon the ending of their relationships, and to grant them rights against third parties. The very instability of cohabiting unions is a strong reason to provide rights to property and support upon dissolution, so long as the relationship has lasted a certain period of time or has produced a child.

If, as recent studies indicate, cohabitants are more likely to merge their finances than to keep them separate, and the presence of a cohabitant in the household adds substantially to the ability of an otherwise single mother to support her child, then we need to worry about vulnerability of the parties if the relationship ends. Legal remedies for the custodial parent (usually the mother)—remedies beyond the child support she can presumably command from the child's biological father—may be very important for the welfare of the children involved.

As we have seen, the female partner is likely to be in the less powerful position economically. If there are—as there frequently are—children in the household, she is likely to be disadvantaged in the marketplace by caring for them, and to be disadvantaged within the internal economy of the partnership by her unequal financial contribution. A joint account system based on equal contributions results in the partner with more income being able to keep more for himself, either for consumption or for investment; and there is no protection for the other partner, whose contributions may have consisted of child care or who may have spent her own wages on things for the kids. Yet her investments in the relationship will not be protected unless legal rules similar to those applied at the end of a marriage are applied to her as well.

To date there is only one issue as to which all states have concluded that the law should treat cohabitants identically to married couples—domestic violence.<sup>220</sup> The ability to get an order of protection, however, is only one part of the protection that abused women require. The lack of legal remedies for cohabitants can place abused women in a very difficult situation: they can escape the

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<sup>220</sup> See Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 103–04 (2005) (reporting that virtually every state's domestic violence legislation protects cohabitants); Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. LAW & FAM. STUD. 135, 193–95 (2005).

household only if they are willing to give up any share in the couple's accumulated property and any hope of financial support.<sup>221</sup>

Are there other reasons to believe that women are more subject to exploitation within cohabiting relationships than are men? This concern was voiced in the earliest literature on the subject. In a 1978 article, Eleanor Macklin brought it up, noting the "tendency for cohabiting females to have higher commitment scores than their male counterparts."<sup>222</sup> Commitment was measured both as personal dedication to continuing the relationship and as behavioral, that is, the changes one makes in one's life that make it likely that one will continue the relationship.<sup>223</sup> It goes without saying that if one partner is more committed than the other, the one less willing to walk away is vulnerable to exploitation, and the one who has committed more behaviorally is likely to be hurt more by its termination.

The NSFH data showed that at least one cohabiting partner expected to marry in 90% of cases, but that the partners frequently disagreed on the subject.<sup>224</sup> Women cohabitants were more likely to see the union as leading to marriage.<sup>225</sup> A higher proportion of cohabiting women than of men indicated that their economic security, emotional security, and overall happiness would be greater if they were married.<sup>226</sup> It therefore seems justified to assume that the woman partner is more often the one arguing or hoping for marriage.

A recent study comparing couples who had cohabited prior to marriage with those who had not cohabited found that females who had cohabited were more dedicated to their partner and to the relationship than those who had not, while men who had cohabited were less committed.<sup>227</sup> The authors concluded that cohabitation appeared to select "for men—but not women—who are . . . less dedicated to their relationships."<sup>228</sup> In short, there appear to be persistent gender differences with relation to commitment, with the resulting potential for exploitation and vulnerability.

For all these reasons, in addition to the presence of children in so many cohabiting households, our main concern should be with the interdependency and

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<sup>221</sup> See, e.g., Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 709–10 (1996).

<sup>222</sup> Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation: A Review of the Recent Literature*, 1 MARRIAGE & FAM. REV. 6 (1978).

<sup>223</sup> *Id.* at 5.

<sup>224</sup> Bumpass, *supra* note 41, at 487 (reporting that in 90% of cohabiting couples studied one partner expected to marry); Rindfuss & Vanden-Heuvel, *supra* note 6, at 707 (citing a then-unpublished 1989 paper by Bumpass, Sweet and Cherlin which reported disagreement between partners concerning marriage).

<sup>225</sup> Rindfuss & VandenHeuvel, *supra* note 6, at 711-12 (citing prior research and limited support in their own 1990 study).

<sup>226</sup> Bumpass, Sweet, & Cherlin, *supra* note 34, at 921.

<sup>227</sup> Stanley, Whitton, & Markman, *supra* note 29, at 509, tbl. 2.

<sup>228</sup> *Id.* at 513.

vulnerability caused by cohabitation; and legal remedies should be directed at addressing this problem.

*B. What We Should Not Worry About: The Impact on Marriage*

A number of legal scholars argue that we should not give legal protection to cohabitation because to do so will harm the institution of marriage, which is, or should be, the societal ideal.<sup>229</sup> Given the statistics on the increase in cohabitation, this could be a case of sacrificing the good in a futile search for the best. In this section, I first deconstruct the argument that in order to protect marriage we must not recognize any other type of union or give benefits to cohabitants. I then argue that historical and comparative experience shows that marriage is unlikely to be harmed by such recognition and benefits.

*1. Incentives and Marriage*

The argument that to give legal status to cohabitants will harm the ideal embodied in marriage assumes that refusal to recognize cohabitation will lead people to marry instead, and that marriage by many of the people currently cohabiting would not be characterized by the bad effects that accompany their cohabitation. Arguments to this effect are seriously flawed in a number of respects.

First, legal incentives do not seem to affect people's private behavior in this way. Indeed, most people are unlikely even to know what their legal rights and obligations are, at least until they get divorced. Many Puerto Rican women in informal unions regard their unions as marriages and may even report them as such, though they in fact have none of the legal protections of marriage.<sup>230</sup> Many people in the United States mistakenly believe that the law in fact does protect them after a certain period of cohabitation, although common law marriage is recognized only in a handful of states.<sup>231</sup> A recent large-scale survey in the U.K. also revealed the widespread existence of a "common law marriage myth": despite the fact that common law marriage was abolished in England in 1753, over half the respondents thought that living together for a period of time (varying, in their opinions, from six months to six years) gave cohabitants the same rights as married couples.<sup>232</sup> Cohabitants in this survey were extensively quizzed about their reasons for entering a cohabiting relationship. The differing legal consequences of cohabitation and marriage played no role in their decision-making, leading the authors of the study to comment upon the "astonishing lack of

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<sup>229</sup> See, e.g., Duncan, *supra* note 1, at 1031.

<sup>230</sup> Landale & Fennelly, *supra* note 7, at 272, 275, 278–79.

<sup>231</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 33 (2002) [hereinafter ALI PRINCIPLES 2002]; see also Bowman, *supra* note 221, at 711 (citing several corroborating sources). Pennsylvania has since abolished common law marriage as well. See 23 PA. CONS. STAT. § 1103 (2005).

<sup>232</sup> Barlow & James, *supra* note 96, at 161–63.

awareness about the different legal consequences of unmarried as opposed to married cohabitation.”<sup>233</sup>

It is unlikely that Americans are more knowledgeable about their legal rights than the British. This may help explain why the rate of cohabitation has continued to climb in the U.S. despite the fact that cohabitants have been offered very few rights and have been treated quite punitively in many states.<sup>234</sup> And some behave contrary to legal incentives even when they may know the consequences. For example, in the past, alimony was terminated in many states when the prior spouse receiving it cohabited, yet divorced persons are among the groups most likely to cohabit.<sup>235</sup> So, if legal disincentives are supposed to discourage cohabitation and encourage marriage, experience shows that they have not been working.

We now have a number of studies, primarily in the context of welfare reform, about the impact of legal incentives upon the rate of marriage. Without exception they show that welfare programs designed to encourage marriage have had no statistically significant effect on the marriage rate.<sup>236</sup> Indeed, one study suggests that entry into marriage is *negatively* associated with the incentives offered by the new federal welfare initiatives which drastically limit payment of benefits to unmarried mothers.<sup>237</sup> These results are consistent with evidence that variations in welfare benefits do not affect the non-marital birth rate either.<sup>238</sup> Human beings apparently do not regulate behavior as private as union formation and childbirth in response to incentives from the state.<sup>239</sup>

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<sup>233</sup> *Id.* at 161. See also Mary Hibbs, Chris Barton & Joanne Beswick, *Why Marry?—Perceptions of the Affianced*, 31 FAM. LAW 197, 200–03 (2001) (reporting on a survey of engaged couples which indicated that the legal consequences of marriage were not among their reasons for cohabiting and that most of them had little idea, or mistaken ideas, about the consequences of marriage).

<sup>234</sup> See, e.g., Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL’Y 119, 125–32, 139–43 (2004).

<sup>235</sup> See IRA MARK ELLMAN, PAUL M. KURTZ & ELIZABETH S. SCOTT, FAMILY LAW: CASES, TEXT, PROBLEMS 485–86 (3d ed. 1998) (discussing the traditional rule terminating alimony upon cohabitation but reporting that the more recent trend is to examine the financial impact of the cohabitation on the party receiving support and thus her financial need before making this decision).

<sup>236</sup> See, e.g., Edin, *supra* note 43, at 113. See generally Moffitt et al., *supra* note 61 (reporting on a variety of state experiments with incentive structures).

<sup>237</sup> Marianne P. Bitler, Jonah B. Gelbach, Hilary W. Hoynes & Madeline Zavodny, *The Impact of Welfare Reform on Marriage and Divorce*, 41 DEMOGRAPHY 213, 232 (2004) (finding that TANF has led fewer, rather than more, women to marry).

<sup>238</sup> Edin, *supra* note 43, at 113; see also Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 739–40 (1992).

<sup>239</sup> A notable exception appears to be the enormous one-year increase in marriages in Sweden in 1989—from 522.9 per 100,000 in 1988 to 1,277.3 per 100,000 in 1989 and down to 471.2 per 100,000 in 1990—in response to a significant pension-based incentive to marry. William N. Eskridge Jr., Darren R. Spedale & Hans Ytterberg, *“Nordic Bliss”? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, 5 ISSUES IN



If people did think and act in this way, however, the incentive structure provided by the current legal treatment of cohabitation in this country is perverse. By not imposing any legal obligations on cohabitants, the stronger partner economically is given an incentive *not* to marry, because to do so would mean being required to share his or her property upon dissolution of the relationship and possibly to support the former partner in the short or long run. Except in the state of Washington, no such obligation currently exists for cohabitants in the absence of a contract, thus presumably encouraging calculating people to take advantage of partners who are weaker, more trusting, or self-deluding about their partner's intentions.<sup>240</sup> Assuming that legal incentives ever affect behavior, any legal remedies set forth should take this possibly perverse incentive into account.

Finally, whether people act in ignorance of their rights or not and whether their behavior is influenced by economic incentives or not, their decisions about whether to marry may respond to some deeper level of rationality. The lower-income women interviewed by Kathryn Edin, for example, may not respond to incentives structured into public assistance law, but they are acting rationally in their decisions not to link their fates in the long run to men who may endanger their own survival and happiness and those of their children. And why should the law want them to do so? If, as the social science seems to show, large numbers of male cohabitants have low commitment quotients and are violence-prone, do we want to encourage them to marry? As discussed above, it is highly unlikely that the institution of marriage would itself transform them into persons who would be able to sustain long-term, productive, and peaceful relationships. Transporting them, if we could, into the institution would therefore not promote the ideals for which marriage is valued in the first place.

## 2. *Legal Treatment of Cohabitation: Cross-historical and Cross-national Comparisons*

It is helpful to look at some statistics in deciding whether to worry about the impact of cohabitation on marriage. More than 90% of every female cohort in the U.S. since the mid-1800s (when records began to be kept) has eventually married.<sup>241</sup> Virtually all young people plan to marry at some time; and 90% are still likely to do so, though the likelihood varies by race and ethnic group.<sup>242</sup> The

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LEGAL SCHOLARSHIP art. 4, 5 n.29, 43 (2004), available at <http://www.bepress.com/ils/iss5/art4>.

<sup>240</sup> See Bowman, *supra* note 234, at 125–26, 129–32. In Washington, cohabitants' property is subject to equitable distribution upon dissolution or death. See *Connell v. Francisco*, 898 P.2d 831, 834–35 (Wash. 1995).

<sup>241</sup> Goldstein & Kenney, *supra* note 17, at 507.

<sup>242</sup> See Bumpass, *supra* note 41, at 488 (reporting, based on NSFH data, that all plan to marry and 90% are likely to marry); see also Goldstein & Kenney, *supra* note 17, at 511 (reporting that close to 90% of American women in the cohorts born in the 1950s and 1960s will marry). For race and ethnic variations in the rate of marriage, see *supra* text accompanying notes 55–56.

vast majority of Americans are very committed to marriage and express a preference for it as the ideal, even when they are not married themselves.<sup>243</sup> One author tracing trends from the 1960s through the 1990s comments that: "One very important continuity is the strong emphasis and commitment given to marriage, children, and family life in America today. . . . Americans overwhelmingly believe that marriage is a lifetime relationship that should not be terminated except under extreme circumstances."<sup>244</sup>

Still, scholars warn us that we need to be careful about this vulnerable institution, apparently believing that people will cohabit instead of marrying if the law makes it "just as good" as marriage in terms of public benefits, or even better than marriage if cohabitants receive benefits without the attendant burdens. One, Lynn D. Wardle, points to early Bolshevik family law as an object lesson in the risks of tinkering with our law.<sup>245</sup> Except as an attempt to taint arguments for changing our legal treatment of cohabitation by a connection to Bolshevism and Free Love, this argument loses me. After one of the most drastic experiments in, as Wardle calls it, "leveling marriage with *de facto* cohabitation,"<sup>246</sup> there is no evidence that marriage was seriously harmed as an institution in the former Soviet Union. Statistics for Belarus, Russia, and the Ukraine, for example, show that in 1980 there were 10.1 marriages per thousand population in Belarus, 10.6 in Russia, and 9.3 in the Ukraine, compared to 10.5 in the United States, 7.4 in the United Kingdom, and 5.7 in Italy that same year.<sup>247</sup> In short, marriage appears to be a very durable institution. The rates of marriage in all these countries dropped by 2001, especially in Belarus, Russia and the Ukraine (to 6.9 per thousand in Belarus and Russia and 5.6 in the Ukraine).<sup>248</sup> However, this was not a response to changes in the countries' family law but most likely to the dire economic situations in these nations—adding yet more persuasiveness to arguments based upon the role of the economic environment on the rate of entry into marriage. Nonetheless, the divorce rate is reported to be higher in the United States (4.95 per thousand) than in Russia (3.36 per thousand).<sup>249</sup>

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<sup>243</sup> See, e.g., Clarkberg, *supra* note 49, at 946–47; Thornton & Young-DeMarco, *supra* note 26, at 1017–19, 1030.

<sup>244</sup> Thornton & Young-DeMarco, *supra* note 26, at 1030.

<sup>245</sup> Lynn D. Wardle, *The "Withering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917–1926*, 2 GEO. J. L. & PUB. POL'Y 469, 470 (2004). The Bolsheviks liberalized divorce, mandated civil marriage, abolished illegitimacy, allowed unilateral divorce, and in 1926 extended marital benefits to *de facto* couples. *Id.* at 473.

<sup>246</sup> *Id.* at 477.

<sup>247</sup> U.N. ECON. COMM'N FOR EUROPE, TRENDS IN EUROPE AND NORTH AMERICA, pt. 2, ch. 2, sec. 2.4, available at <http://www.unece.org/stats/trend/register.htm>.

<sup>248</sup> *Id.* The rates had fallen in the U.S. to 8.4 per 1000, in the U.K. to 5.1 per 1000, and in Italy to 4.5. *Id.*

<sup>249</sup> See Nationmaster.com, Divorce Rate by Country, [http://www.nationmaster.com/graph/peo\\_div\\_rat-people-divorce-rate](http://www.nationmaster.com/graph/peo_div_rat-people-divorce-rate) (last visited Dec. 7, 2006).

The comparisons of most immediate interest are those with Western European countries that have in fact extended legal protections to cohabiting couples, such as the Netherlands, Sweden, and France. In the Netherlands, heterosexual couples may choose between marriage and registration as domestic partners, which is virtually identical to marriage in legal status.<sup>250</sup> Yet the rate of cohabitation to marriage in the Netherlands (25% of unions are cohabitations) is identical to that in the U.K., where legal protections are denied to heterosexual cohabitants.<sup>251</sup> In Sweden, heterosexual cohabitation has been accepted for the longest period of time and is given very favorable treatment by the government, and cohabitants' property is distributed equally between them at the end of their relationships.<sup>252</sup> Yet Eurobarometer surveys show that 90% of Swedish young people are in favor of marriage, and 61.2% of cohabiting women aged 15 to 44 in Sweden eventually marry their partners, compared with 48% in the United States.<sup>253</sup> In short, giving positive legal treatment to cohabitation does not seem to discourage the transition to marriage and may in fact encourage it.

In France, where the Pacte Civil de Solidarité allows cohabitants who register to receive some of the benefits of marital status, about 83.5% of adult women will cohabit between ages 15 and 45, compared to about 50% in the U.S.<sup>254</sup> Approximately equal proportions of cohabitants will end their cohabitation by marrying or by separating: 46.3% will marry in France and 48% in the U.S.; 53.7% will separate in France and 52% in the U.S.<sup>255</sup> But their cohabiting unions vary dramatically in duration, with a median of 4.28 years in France and about 1.17 in the U.S.<sup>256</sup> Moreover, although almost half of coupled Swedish men and women between the ages of 30 and 39 are cohabitants rather than married, 70% of Swedish 17-year-olds live with both their biological parents.<sup>257</sup> This makes a great deal of difference to the children affected by these unions.

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<sup>250</sup> See Katharina Boele-Woelki, *Registered Partnership and Same-Sex Marriage in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 41, 45–48 (Katharina Boele-Woelki & Angelika Fuchs eds., 2003).

<sup>251</sup> Kiernan, *supra* note 21, at 981, 984–85.

<sup>252</sup> See Hans Ytterberg, "From Society's Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life": A Swedish Story of Love and Legislation, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 427, 429 (Robert Wintemute & Mads Andenaes eds., 2001); Anne Barlow, *Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain Within Europe*, 26 LAW & POL'Y 57, 61–62 (2004).

<sup>253</sup> Kiernan, *supra* note 21, at 980; Heuveline & Timberlake, *supra* note 21, at 1223, tbl. 2.

<sup>254</sup> Heuveline & Timberlake, *supra* note 21, at 1225–26.

<sup>255</sup> *Id.* at 1223, tbl. 2.

<sup>256</sup> *Id.* (substituting the median duration in the social science literature described above for that in Heuveline's, tbl. 2).

<sup>257</sup> See, e.g., Kiernan, *supra* note 21, at 982 (reporting proportion of cohabiting and married among 30- to 39-year-old men and women as 48% to 52%); Eskridge, Spedale & Ytterberg, *supra* note 239, at 7.

The expected probability of exposure to at least one maternal cohabitation by age 16 is about 40% in France, followed closely by about 34% in the United States.<sup>258</sup> Given these probabilities, what is best for the children involved, if they cannot all be raised by married biological parents (as is decreasingly the case even for those born to married couples)? To grow up where cohabiting unions last a long time and have the highest probability of transition into marriage appears best in this second-best world. In the United States, children have perhaps the worst of all possible worlds, in which the probability of exposure to parental cohabitation is very high but the median duration is brief and less than one-half of cohabiting couples marry. The best case scenario is presented in Sweden, with its lengthy tradition of cohabitation and very generous legal treatment of cohabitants, where the median duration of cohabitation is 3.44 years and there is a 61.2% rate of transition to marriage.<sup>259</sup> Indeed, the authors of one comparative study conclude that it is precisely *because* cohabitation has become virtually indistinguishable from marriage in Sweden that more people eventually do marry.<sup>260</sup>

In sum, offering legal recognition and support to cohabitants and making their lives easier does not appear to discourage marriage, and in fact the opposite may be true. Moreover, arguments that extending benefits to cohabitants will discourage marriage typically assume that the benefits of marriage will be extended without the obligations and that all groups of cohabitants will be treated the same. The recommendations I set forth in the following section deviate from these assumptions.

### III. RECOMMENDATIONS/GUIDELINES

In this section I make recommendations concerning legal remedies that would be consistent with the social science literature I have described above and the implications I have drawn from it. I confine my recommendations here to basic guidelines. My priorities are two-fold: first, to protect persons who are vulnerable as a result of the family or family-like relationships in which they have been involved, to do so without moral judgment of those relationships, and to impose responsibilities where that result is necessary to this goal; and, second, to provide access to benefits which may help to stabilize cohabiting relationships and increase the likelihood of transition to marriage. I also attempt to ensure that a couple not desiring to undertake commitments to one another will be able to avoid doing so and not to cast the net so wide that short-term cohabitants or those unlikely to have developed mutual dependencies will be caught in it. This is not always possible; and when these goals conflict, I give priority to protection of the vulnerable.<sup>261</sup>

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<sup>258</sup> Heuveline & Timberlake, *supra* note 21, at 1224, fig. 2.

<sup>259</sup> *Id.* at 1223, tbl. 2.

<sup>260</sup> *Id.* at 1225.

<sup>261</sup> This is also the priority of Professor Milton C. Regan, Jr. See Milton C. Regan Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE

The goal of this article is to convince the reader, based on social scientific evidence about what cohabitation looks like in our society today, that this is a desirable approach for our legal system. I also design pragmatically, for the nation in which I live, where cohabitation is widespread but the state has not undertaken to build the safety nets that exist in many other developed nations for persons who are disadvantaged in the market. Thus in many circumstances it is necessary to privatize welfare functions that might elsewhere be undertaken by the state, and in other cases to extend to cohabitants public support systems that are now available only to married persons.<sup>262</sup>

Given the diverse groups of cohabitants, it is clear that legal remedies need to be multiple and layered. Recall, for example, the groups described above as including large numbers of cohabitants.<sup>263</sup>

1. Young singles sharing quarters for reasons of convenience and economy;
2. Young adults cohabiting as some sort of trial marriage;
3. Working-class couples without resources for a wedding or a home of their own;
4. Low-income mothers, many of whom are African American and some of whom are receiving public assistance;
5. Puerto Rican couples in consensual unions, often with children of the union;
6. Divorced persons screening candidates for remarriage or seeking an alternative to marriage; and
7. Older persons cohabiting for convenience, economy, or because they have no particular reason to marry.

For purposes of legal treatment, these cohabitants will be reorganized into three main categories:

- (1) Short-term cohabitants without children: This category will include those who are essentially dating, living together for convenience, and many of those who are trying out a relationship to see if it should be transformed into a marriage.

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DAME L. REV. 1435, 1449 (2001). However, Regan would address this goal on a claim-by-claim basis, extending rights in certain categories of cases and not others. *Id.* at 1450–51. I reject this approach as administratively burdensome, opting instead for the bright-line rules I describe in the text below.

<sup>262</sup> I do include one unrealistic assumption for purposes of this heuristic: I assume that federal law benefits and burdens can be included within the package of rights and obligations reserved in our system to the states. This assumption is included for purposes of advocating what I believe to be the best system of legal treatment, realizing that in the United States it would be necessary to seek its institution on a state-by-state basis and on the federal level as well.

<sup>263</sup> See *supra* text accompanying note 82.

- (2) Cohabitants with a biological child of the union: Many of the Puerto Rican couples will fall into this category, as will many others, based on the statistics that 40% of all cohabiting couples have children in the household and that about half of those children are the biological children of both partners.
- (3) Long-term cohabitants: This category is defined as those who have been together for two years or more. Extrapolating from the 2000 census report that there were 4.9 million opposite-sex unmarried-couple households, and thus presumably at least 9.8 million individuals, and taking the NSFH figures on duration from the 1989 Bumpass and Sweet article (which we now see may be low), about 33% of all cohabitants make it past this mark. This group thus includes at least 3,234,000 people.<sup>264</sup> This is a considerable number of persons affected by any policy, particularly considering that 40% of their households contain children. But it also weeds out a large portion of the short-term cohabitants in the census.

The guidelines for legal treatment I recommend include several layers: First, domestic partners who have been together two years or who have a biological child should be treated as though they were married. Second, a system for registration as domestic partners with the benefits and burdens of marriage should be provided. Third, the ability to contract out of these obligations should be insured for couples who do not wish to be treated as though married or want to execute a contract specifying the rights they do and do not have vis-à-vis one another. I will discuss each of these layers in turn.

*A. Imposition by Law of Quasi-marital Status on Partners  
of Two Years Duration or with a Common Child*

First, after they have been cohabiting for two years or have given birth to a child, a cohabiting couple will be treated as though they were married. The American Law Institute has suggested a somewhat similar remedy in the Principles of the Law of Family Dissolution published in 2002, but it provides only divorce-style remedies upon dissolution of the relationship, including property distribution and maintenance, and no rights against third parties or the state.<sup>265</sup> The ALI remedies would be presumptively available to individuals who had cohabited for a state-defined period and who act jointly with respect to household management or have a common child; others may establish that they are domestic partners through proof of a number of factors having to do with

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<sup>264</sup> MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS, *supra* note 22, at 1; Bumpass & Sweet, *supra* note 9, at 620.

<sup>265</sup> See ALI PRINCIPLES 2002, *supra* note 231, at §§ 4.09-.10, 5.04, 6.04-.06.

intimacy and interdependence.<sup>266</sup> My proposal is different in two ways. First, it eliminates the proof-by-factors method of establishing partnership and substitutes the non-discretionary approach of “two years or a child.”<sup>267</sup> Second, my proposal extends far beyond the divorce remedies that may be of use only to relatively well-off couples, those who have property or income to share after separating their households. It treats the couple as though they were married, thus entitling them, among other things, to the right to inheritance, rights against third parties (such as suits for negligent infliction of emotional distress and for loss of consortium), rights against the government (such as social security survivors benefits, workers compensation, and taxation as a coupled unit), and rights in the private sphere (such as eligibility for family health insurance, next-of-kin status in hospitals, and the like). Given the information we have about the groups who are likely to cohabit, these are the rights of most value to them.

I have chosen two years as the period of time after which cohabitation will be transformed into a quasi-marriage for a number of reasons. First, the statistics indicate that this durational requirement will cut out large numbers of cohabitants who may not wish or intend legal consequences to be visited upon their relationship. Second, supported by our knowledge that most cohabitants do indeed mingle their finances, it is reasonable to presume economic interdependence after that period of time together.

Attachment of these rights upon the birth of a child to cohabitants should need no explanation. A common child presumptively entwines the obligations of the two parents. Even though the custodial parent would be entitled to child support regardless of marital status if their union dissolves, this provision is inadequate. Not only is the amount awarded in child support typically inadequate to support most children,<sup>268</sup> but such awards also provide no support for the custodial parent and thus make the situation of the child even worse. Upon divorce, a married custodial mother is entitled to property distribution and possibly alimony, which can be critical to the welfare of her child; and she may be awarded possession or ownership of the home in which she and the children reside. A cohabiting custodial parent would be entitled to none of this, and thus the child's welfare would be injured by the parent's worsened economic status. In addition, a long-term cohabitant who was the primary caretaker of children who had reached their majority would be without any remedy at all; all of her investment in the household could be lost if the couple's assets are titled in her

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<sup>266</sup> *Id.* at § 6.03.

<sup>267</sup> This is, in part, to address fears that the factors approach makes too much work for the court. My primary concern, however, is that a factors approach gives too much discretion to judges, who have shown in deciding cohabitation contract cases that they are likely to err in the direction of bias against cohabitants' rights. *See, e.g.,* Bowman, *supra* note 234, at 126–27. It may still be necessary to allow the use of a factors approach for the presumably small number of people who are not really cohabitants yet are caught in the new net of obligation.

<sup>268</sup> *See* MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 771–72 (2d ed. 2001).

partner's name.<sup>269</sup> And the assets are likely to be titled in his name if he has brought in more money to the household while she has invested in caretaking and spent much of her wages upon the family.

Some scholars suggest that a variety of equitable, contract, and property law remedies are adequate to address situations like this.<sup>270</sup> I disagree, for a number of reasons. Contractual remedies require an agreement by both parties, work best where the two are of roughly equal bargaining power, can be difficult to prove if oral, and have often been interpreted by the courts to exclude contributions that are not easily monetized, so that homemakers' contributions are rarely reimbursed.<sup>271</sup> Remedies based in property law or equity, such as unjust enrichment, quantum meruit, and constructive trusts, are similar in this last respect. The typical situation in which they may be of use to cohabitants is when one party contributes specific amounts of money to the accumulation of property titled in the name of the other partner.<sup>272</sup> These causes of action do not remedy the more typical situation where a female cohabitant contributes to household expenses, devotes labor to her partner's business, or simply takes care of the house and children.<sup>273</sup> This is precisely the area of human behavior that family law, not property law, is designed to address.<sup>274</sup> Moreover, remedies under property and contract law apply only to the two parties; they cannot confer benefits against third parties or the state.

As I've noted above, for many cohabiting couples, there will be no accumulated property to divide; and thus a variety of other benefits are much

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<sup>269</sup> See Barlow & James, *supra* note 96, at 148–49. In another article, Anne Barlow argues that the family home is a special kind of property and proposes a modified community of property system under which the non-owner cohabitant would gain an increasing interest in the home, at 10% a year, up to 50%, or higher if the non-owner is the primary caretaker of children in the home. *Rights in the Family Home—Time for a Conceptual Revolution?*, in *NEW PERSPECTIVES ON PROPERTY LAW, HUMAN RIGHTS AND THE HOME 74* (A. Hudson ed., 2004).

<sup>270</sup> See, e.g., Garrison, *supra* note 1, at 891–94. Professor Garrison also suggests that we revive common law marriage. *Id.* at 887–88. I have been a prominent supporter of reviving common law marriage in the past, for reasons similar to those that now drive my proposals for protection of cohabitants. See generally Bowman, *supra* note 221. The world, however, has been moving in the opposite direction, and several states have abolished common law marriage since I wrote that article. See, e.g., 23 PA. CONS. STAT. ANN. § 1103 (2005). At any rate, the doctrine will not protect many cohabitants today. It requires that the couple hold themselves out to the world as husband and wife, while modern cohabiting couples neither feel the need to do so nor think of themselves that way.

<sup>271</sup> See Bowman, *supra* note 234, at 126–29.

<sup>272</sup> See *id.* at 123–24.

<sup>273</sup> See, e.g., Ann Laquer Estin, *Unmarried Partners and the Legacy of Marvin v. Marvin: Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1395 (2001).

<sup>274</sup> Scholars of equitable remedies also question whether they are appropriate in marriage-like relationships, especially with respect to domestic services. See, e.g., Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 729–30 (2006).



more important to their welfare, in particular, benefits designed to address situations of dependency, such as workers compensation and social security survivors benefits, treatment as an economic unit for purposes of taxation, and inheritance. A long-term caretaking cohabitant would be without any of these support systems if his or her partner died. Yet empirical studies show, for example, that most cohabitants want a substantial share, if not all, of their estates to go to their cohabitants upon their death even though they fail to make wills, which is the only way this intention can currently be effectuated.<sup>275</sup> For all of these reasons, it is important effectively to impose the status of marriage upon cohabiting couples whose unions have endured two years or more or who have a common child.

### *B. A System of Registration for Domestic Partnerships*

Second, I advocate allowing cohabitants to register as domestic partners if they wish to do so from day one of their relationship—a domestic partnership similar to that available to same-sex couples and heterosexuals over the age of 62 in California since January 1, 2005.<sup>276</sup> This would allow heterosexual couples who want to avoid the religious or gender-based assumptions of traditional marriage to enter into a status with both its benefits and its burdens, such as the duty of support and common ownership of property. In the Netherlands, a domestic partnership system parallel to marriage was set up initially to accommodate gay couples (who now can simply marry), but heterosexuals have far outnumbered the same-sex couples who registered; heterosexual couples were also attracted by the *Pacte Civil de Solidarité* in France.<sup>277</sup>

This type of partnership law would address the complaint leveled at many domestic partnership arrangements, that they allow persons who are not married to gain some or many of the benefits of marriage without the burdens. When domestic partnerships in California were transformed from the more limited type primarily granting benefits to a system that requires sharing of property and support, the state sent out notices to all currently registered partners that they must officially terminate their partnerships to avoid this consequence—and more than

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<sup>275</sup> See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 38 (1998).

<sup>276</sup> See California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. AB 205 (West).

<sup>277</sup> See, e.g., Wendy M. Schrama, *Registered Partnership in The Netherlands*, 13 INT'L J. LAW, POL'Y & FAM. 315, 322 (1999) (reporting that one-third of the registrants in the first year were heterosexual); Boele-Woelki, *supra* note 234, at 47 (reporting that heterosexual partners far exceeded same-sex partners through 2002); Suzanne Daley, *French Couples Take Plunge That Falls Short of Marriage*, N.Y. TIMES, Apr. 18, 2000, at A1 (reporting that about 40% of the 14,000 couples entering PACS in the first four months were heterosexual).

2,500 did so (1,188 in December 2004 alone, to beat the January 1 deadline).<sup>278</sup> Not all of them did so to avoid the burdens that would accompany the benefits, however, but instead because of uncertainties about the interaction of the new status with various rights under federal law or private benefits.<sup>279</sup> But some undoubtedly were persons who specifically wished to avoid financial commitments to one another such as those imposed by marriage. To do so under my system they would need to take action before their relationship had endured for two years or a child was born. For couples in which one partner desires commitment and the other wants to take advantage of his partner's contributions while avoiding any obligation, I believe this result is appropriate.

### *C. The Ability of Cohabitants to Contract Out of Obligations*

Third, I would allow couples to contract out of undertaking obligations to one another. Setting the terms of cohabitation (or even of marriage) by contract is now allowed by almost every state, although it affects only rights between the two parties.<sup>280</sup> My proposal shifts the burden on this issue, so that the party wishing to avoid commitment must take action before two years of cohabitation have elapsed, or by mutual agreement thereafter, rather than requiring people to contract in to these commitments. If both agree to opt out, a simple form could be provided for this purpose, to be notarized and filed with a court without the assistance of a lawyer. It would, of course, be better if both parties were advised of the rights they would be giving up, but this is not always required for premarital contracts waiving legal rights either.<sup>281</sup>

If the two partners disagree, the party on the side of commitment and obligation is thus given substantial bargaining power; and in many, if not most, situations this will be the party who is in a weaker economic situation or more vulnerable for some reason. The party wanting to avoid these commitments is then put to the choice of terminating the relationship and whatever advantages he or she derives from it, or having a changed status imposed upon him or her.

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<sup>278</sup> Rona Marech, *California Partners Law Now Prompts Caution: Many Gay Couples Opt Out, Citing Legal Uncertainties*, S.F. CHRON., Mar. 28, 2005, at B1. There were about 25,525 active partnerships of same- and opposite-sex couples left at the end of December 2004. *Id.* See also Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 HASTINGS WOMEN'S L.J. 39, 57 (2006).

<sup>279</sup> Monagas, *supra* note 278, at 58.

<sup>280</sup> Express contracts between cohabitants are recognized by every state except Illinois, Georgia and Louisiana. See Bowman, *supra* note 234, at 126, 129.

<sup>281</sup> See, e.g., *Simeone v. Simeone*, 581 A.2d 162, 167–68 (Pa. 1990). There will still be problems related to the inability to see into the future, of course, and to predict vulnerability and dependency that may arise over the course of a long relationship.

*D. Impact of Proposals on Varying Groups of Cohabitants*

Should we worry about the fact that this system may drive some persons to leave cohabiting relationships when they might not otherwise have done so? Perhaps some of them—those who are violence-prone, or unable to form long-term commitments to intimates, for example—would be better left outside the confines of marriage-like relationships in general. But, given the diversity of cohabiting relationships, these and other questions are best considered in concrete cases. Let's examine how the rules I have outlined above will affect each of the groups I have listed.

Young single people who are essentially in a dating relationship that involves sharing a residence, sometimes for reasons of convenience or economy, will need to split up or contract out of obligations by the end of two years of cohabitation. As we have seen above, however, the younger the cohabitants are, the less stable their relationship is; thus many, if not most, of these unions may have dissolved by the two-year deadline.<sup>282</sup> Similarly, young adults who cohabit prior to marriage, or as some sort of trial marriage, would need to decide about its success or failure within a two-year period.

What would be the impact on low-income mothers who are receiving contributions to their support and that of their children from cohabitants? Most of these unions are also very short term, and in-depth interviews such as those done by sociologist Kathryn Edin indicate that the women involved are wary of longer term connections with the men involved. These cohabitants could nonetheless have obligations imposed upon them if they remain together for two years or more. If the man is employed, this would give the woman a right to support from him both during the relationship and after it ends; the new status would also give both access to a variety of government benefits and rights against third parties that currently attach only to marital status. If, as is more frequently the case, the man has a tenuous connection to the labor force, the woman could end up with obligations of support to him if she does not evict him in time. Two things alleviate my concern about this possibility: first, that the women Edin interviewed seem very attuned to the possibility of exploitation by a non-productive male already and, second, the fact that the remedies applied upon dissolution of marriage would typically protect them, for example, by allocating property on the basis of factors such as a party's contribution to its acquisition or to the work of the household.

Many of the Puerto Rican couples in consensual unions (usually with children) already think of themselves as married. Cohabitation typically results in a 51% gain to their household income, indicating both that the partners and their children benefit from the relationship and that their finances have become intertwined. It is appropriate to extend the benefits and the continuing support obligations of marriage to these couples. To do so will also give them and their

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<sup>282</sup> CDC, *supra* note 56, at 16, fig. 13 (correlating age at start of cohabitation with probability of breakup).

children the protection, for example, of workers compensation law, standing to sue for relational injuries such as loss of consortium and negligent infliction of emotional distress, social security survivors benefits, and access to important benefits such as family health insurance.

Divorced persons cohabiting either to screen possible candidates for remarriage or seeking an alternative to marriage will need to contract out of further obligations if they do not wish to incur them after two years. The experience of divorce is often a great sensitizer to legal rights and obligations, though; and these people will probably be wary enough to opt out if they do not wish to undertake obligations to one another.

Older persons cohabiting for convenience, economy, or because they have no particular reason to marry are similar to divorced persons in some of these respects. Often a main objection to marriage for these groups is raised by their bonds to children from previous unions. Inheritance law can pose a particular problem for elderly persons, but they can draft wills to address their concern for their children whether they are married or have the status thrust upon them by the passage of time. Moreover, elderly people who have joined their households and household economies in order to survive can be left in an extremely vulnerable position if one partner can simply leave a two-year relationship without any legal remedy being available to the other partner.

In sum, the legal remedies I outline here benefit, on balance, each of the main groups I have described. There is no perfect fit between legal remedy and reality, but these are the best under the circumstances. They impose obligations after a period of time but also allow couples to opt out if they agree to do so. Some couples will nonetheless be “caught” by legal obligations they did not anticipate and did not intend. If they agree on this, there is no problem; they can enter into a contract limiting their obligations to one another. However, one of the two—the partner who would prefer at the moment of dissolution to avoid all obligations to the dissolved union—may be caught by duties he does not desire to undertake. In some cases, his desires and intentions may have been different at an earlier period in the relationship, before it reached the point of breakdown. But this is no different from marriage, where the member of a divorcing couple from whom support is sought often seeks to avoid obligations he or she would have accepted if the union were ongoing and which were contemplated at its inception.

What may happen when obligations are imposed upon a commitment-phobic person? Violence is a possible response in some cases. Remedies for protection against domestic violence have already been designed for both spouses and cohabitants, as well as formerly married and formerly cohabiting persons.<sup>283</sup> We should strengthen and enforce those remedies. By extending family law remedies to long-term cohabitants we may also create the conditions under which potential victims are enabled to rebuild their lives at the end of a cohabiting relationship,

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<sup>283</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 60/103 (West 2006) (defining protected persons to include persons who share or formerly shared a common dwelling as well as spouses and former spouses).

with, if need be, the compelled assistance of the former cohabitant as well as other benefits now provided only to married couples. Where a conflict arises between autonomy and protection of persons made vulnerable by long-term relationships, my priority is to protect the vulnerable.

When I think of legal remedies, I often use a former legal clinic client of mine as a touchstone—a woman in her late thirties, a victim of domestic violence who had cohabited with her partner for fifteen years, staying home and raising their two children. She did eventually leave her abuser, but she could not afford to take her children with her; she had to move back in with her mother in order to survive. The legal system I have proposed here would have protected her. It would have allowed her to sue for an equitable share of the couple's house and accumulated property. Indeed, she might not have had to leave the house in the first place, even though it was titled in her partner's name. She could have sued for maintenance in addition to child support. She would have been entitled to an interest in her partner's pension and eventually in his social security benefits. In the United States today, only the law of the state of Washington would entitle her to some portion of these benefits.<sup>284</sup> By contrast, the remedies outlined here would have allowed her some dignity and security after a fifteen-year relationship, and they would have enabled her children to be raised by a non-abusive parent.

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<sup>284</sup> See *Connell*, 898 P.2d at 834–35 (conferring rights of equitable property distribution in marital-like relationships upon dissolution or death).